SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 138

UNITED STATES OF AMERICA, PETITIONER,

vs.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEA.		
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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 24190

American-Foreign Steamship Corporation, Libelant-Appellant,

· against

UNITED STATES OF AMERICA, Respondent-Appellee.

Adm. 183-356

Appendix to Appellant's Brief-Filed September 28, 1956

2 IN UNITED STATES DISTRICT COURT

Amended Libel and Complaint—Filed September 23, 1955

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

A. 183-356

The Amended Libel and Complaint

of

American-Foreign Steamship Corporation, 80 Broad Street, New York, N. Y.

v. .

THE UNITED STATES OF AMERICA in a Cause of Contract, Civil and Maritime, Alleges upon Information and Belief as Follows:

- 1. Jurisdiction of this Court in this suit is claimed under the Suits in Admiralty Act, 46 U.S.C. 741 et seq. Libelant hereby elects to have this cause proceed in accordance with the principles of libels in personam.
- 2. Libelant is a corporation organized under the laws of the State of New York, having its principal place of business at 80 Broad Street in the City, County, State and Southern District of New York, and is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, 46 U.S.C. 802.

- 3. Respondent's actions hereinafter set forth were taken through the War Shipping Administration (hereinafter called WSA), United States Maritime Commission (hereinafter called the Commission), and the Maritime Administration of the United States Department of Commerce, all
- of said agencies being instrumentalities of the United

 States. The functions of WSA were transferred to
 the Commission by Public Law 492, 79th Cong.,

 60 Stat. 401. The functions of the Commission were transferred to the Maritime Administration by Reorganization
 Plan 21 of 1950, 15 F. R. 3178.
- 4. Pursyant to and in accordance with the terms of The Merchant Ship Sales Act of 1946, respondent was authorized to charter certain war-built vessels to citizens of the United States. Section 5(c) of that Act, 50 U.S.C. App. 1738(c), made the terms of Section 709 of the Merchant Marine Act, 1936, 46 U.S.C. 1199, applicable to charters made under The Merchant Ship Sales Act of 1946. Section 709 of the Merchant Marine Act, 1936, provides, in part:
 - "(a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: Provided. That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."
 - 5. Libelant applied to WSA and, later, to the Commission to bareboat-charter certain war-built merchant vessels of the United States under the Merchant Ship Sales Act. Bareboat charter agreements purportedly in accordance with that Act were prepared by respondent and tendered

to libelant for execution as a condition precedent to the allocation of vessels pursuant to the aforesaid applications. Accordingly, libelant and respondent executed such charter agreements as follows: Contract No. WSA-13061.

4 WARSHIPDEMISEOUT Form No. 203 on June 6, 1946, and addendum thereto; and Contract No. MCc-41726, SHIPSALESDEMISE Form No. 303 on September 2, 1946, and addenda thereto. The following merchant ves-

sels owned by the United States were chartered to libelant

under the aforementioned charter agreements:

Contract WSA-13061	Date of Delivery	Date of Redelivery
S.S. WILLIAM LIBBEY	6-24-46	9-20-46
S.S. JAMES ROY WELLS	6-24-46	9-22-46
S.S. NATHAN CLIFFORD	7- 3-46	A 9-28-46
S.S. ABIGAIL GIBBONS	7- 9-46	10- 4-46
S.S. WALKER D. HINES	7-16-46	10-10-46
S.S. SAMUEL D, INGHAM	7-20-46	·9- 9-46
S.S. THOMAS NELSON	7-23-46	9- 6-46
S.S. JOHN LIND	8-1-46	9-11-46
S.S. EDWARD L. LOGAN	8-22-46	11-10-46
S.S. ROBERT WATCHORN	8-24-46	10-17-46
S.S. JOHN P. POE	8-30-46	11- 8-46
	1	
Contract MCc-41726		
S.S. EDWARD L. LOGAN	11-11-46	5-19-47
S.S. ROBERT WATCHORN	10-18-46	5-26-47
S.S. NATHAN CLIFFORD	9-29-46	5-26-47
S.S. WILLIAM LIBBEY	-9-21-46	7-14-47
S.S. PETER DESMET	5-17-47	1- 7-48
S.S. GEORGE HANDLEY	2-13-47	1-26-48
S.S. WILLIAM P. MCARTHUR	4-23-47	1-25-48
S.S. JOHN A. QUITMAN	11-16-46	2- 4-48
S.S. SAMUEL D. INGHAM	9-10-46	2-20-48
S.S. CASMIR PULASKI	11-16-46	3-10-48
S.S. O.B. MARTIN	5-17-47	3-17-48
S.S. MARGARET FULLER	2-17-47	5-31-48
S.S. ABIGAIL GIBBONS	10- 5-46	9-29-49
S.S. JAMES ROY WELLS	9-23-46	11-21-49
S.S. WILLIAM WHEELWRIGHT	11- 9-46	11-22-49
S.S. JOHN LIND	9-12-46	11-25-49
S.S. JOHN P. POE	11- 9-46	11-25-49
S.S. THOMAS R. MARSHALL	-6-12-47	12- 7-49
S.S. OSCAR CHAPPELL	10-14-46	12-15-49
S.S. THOMAS NELSON	9- 6-46	12-27-49
S.S. WALKER D. HINES	10-11-46	12-28-49

6. Clause 12 of Part II of Contract No. MCc-41726 (46 C.F.R. 299.82) provided:

"Clause 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month."

Such basic charter hire was duly paid by libelant to respondent.

7. Notwithstanding the provisions of both The Merchant Ship Sales Act of 1946, particularly Section 5(c) thereof, and the Merchant Marine Act, 1936, particularly Section 709 thereof, and in violation thereof, respondent unlawfully inserted in Part II of the aforesaid charter agreement, Clause 13 (46 C.F.R. 299.82), reading as follows:

"CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centurit per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumuCumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of \$100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$100 per day but not in excess of \$300 per day—75% on such excess over \$100 per day.

Cumulative net voyage profit (in excess of 10% per annuam on capital necessarily employed) in excess of \$300 per day—90% on such excess over \$300 per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner, provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

8. Respondent prescribed in General Order 60, Supplement 21 (46 C.F.R. 299.37-2), Accounting Procedures and Regulations which respondent required libelant to follow, reading, in part, as follows:

"II. Accounting Requirements.

"A. Contract Provisions and Applicable Orders and Instructions

"1. Clause 13 of Part II of WARSHIPDEMISE-OUT 203 and SHIPSALESDEMISE 303 preserves the fundamental bases for the calculation and payment to the Commission of additional charter hire. These clauses provide, among other things, for preliminary payments by the Charterer to the Owner on account of additional charter hire, subject to adjustment upon completion of final audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due.

"2. General Order 60, Supplement 8, and amendments thereto, prescribe the times at which and the manner and amounts in which such preliminary payments are required by the Owner to be made by the Charterer. To implement these provisions of General Order 60, on or about November 25, 1946 instructions were issued for the guidance of Charterers in the preparation of the statements required to accompany preliminary payments on account of additional charter hire, upon the express understanding that neither their issuance by the Commission nor their observance by the Charterer would prejudice the rights of either under the applicable agreement or otherwise, and that the Commission reserved the right to prescribe other bases for the determination of additional charter hire at the time of the annual or final accounting under the respective agreements. Such instructions have been supplemented from time to time.

"B. Annual and Final Accounting

- "1. Pursuant to the applicable provisions of the bareboat charter agreements, the Commission hereby requires that each Charterer submit a separate final accounting of additional charter hire accrued to the owner during the entire period of operations under WARSHIPDEMISEOUT 203 and for each annual or everall accounting period under SHIPSALES-DEMISE 303 and addenda thereto. Each such accounting shell be submitted in sextuplicate and shall include the basic statements prescribed in Part V—Statements Required by the Commission—hereof.
- "2. With the respect to each such accounting, if the amount of additional charter hire shown hereby

to have accrued to the Owner is in excess of the total of the payments theretofore made to the Commission (less any refunds theretofore made by the Commission on account of such payments) on account of additional charter hire for the period involved, such accounting shall be accompanied by the Charterer's check payable to the 'Treasurer of United States for account of United States Maritime Commission' in the amount of such excess.

- "3. If, conversely, in any instance the amount of additional charter hire shown by such accounting to have accrued to the Owner is less than the total of the payments theretofore made to the Commission (less any refunds theretofore made by the Commission on account of such payments) on account of additional charter hire for the period involved, the Charterer may apply to the Commission for refund of such overpayment and, if such application is found to be in order, the amount of the overpayment will be refunded by the Commission . . ."
- 9. Pursuant to the aforesaid Clause 13 of Part 2 of the charter agreement (Contract MCc-41726) and the foresaid General Order 60, Supplement 21, respondent required libelant to make preliminary payments and libelant did make preliminary payments of additional charter hire to respondent for the period of operations from June 1, 1946 through December 31, 1949, totaling the sum of \$1,503.753.60.
- 10. The formula prescribed by the Merchant Ship Sales Act of 1946, particularly Section 5(c) thereof, and the Merchant Marine Act, 1936, particularly Section 709 thereof, fixes the amount of additional charter hire that accrued to respondent for the period of operations from June 1, 1946 through December 31, 1949, at \$1,193,386.28.
- 11. On October 11, 1954, pursuant to Supplement 21 of General Order 60, libelant submitted to respondent a final accounting for the period of operations from June 1, 1946 through December 31, 1949, which showed that there was then due and owing by the respondent to the libelant the sum of \$310,772.41, being the difference

between the preliminary payments of charter hire made by libelant to respondent (\$1,504,158.69) and the amount of additional charter hire fixed by the aforesaid Acts of Congress (\$1,193,386.28). A copy of said final accounting is annexed hereto, made a part hereof, and marked Exhibit A.

- 12. At the time libelant filed said final accounting, libelant duly demanded from respondent the aforesaid sum of \$310,772.41. (The said final accounting and the said demand were subsequently amended by reducing the amount claimed to \$310,367.32.)
- 13. On November 3, 1954, and at various times thereafter, respondent refused and continues to refuse to accept the said final accounting submitted by the libelant or to audit the same or to pay to libelant the aforesaid sam of \$310,367.32, or any part thereof.
- 14. Libelant has duly performed all conditions on its part to be performed.

Wherefore, libelant prays that respondent be required to appear and answer the matters aforesaid and that this Court decree to libelant damages in the amount of \$310,367.32, together with interest and costs.

ARTHUR M. BECKER
Foley & Statt
Proctors for Libelant
Office and Post Office Address:
80 Broad Street
New York, N. Y.

AMERICAN FOREIGN STEAMSHIP CORPORATION RECAPITULATION OF ADDITIONAL CHARTER HIRE PAID AND PAYABLE FOR REVISED ACCOUNTINGS AND SUPPLEMENTARY ACCOUNTINGS SUBMITTED TO JULY 31, 1954

			Cumulative Net Profit in Excess of 10% Per Annum of "Capital Necessarily Employed"	Provisions for Federal Income Taxes	TOTAL	Accordance of Merch	Charter Hire in g With Sec. 5:C ant Ship Sales t of 1946	Additional Charter Hire Paid U.S.M.A.	Difference Due American Foreign Steamship Corp.
1046			•			Percent	Amount	*	
1946 203 203 203	As per Revised Accounting dated 12-4-52 Supplementary Accounting to 7-31-54‡ Supplementary Exhibit "A"		\$ 656,258.00 327.75	**\$12,087.54	\$ 656,258.00 327.75 — 12,087.54	50% 50% 50%	328,129.00 163.88 — 6,043.77	328,129.00	
000			14 000 57		14.000.55		322,249.11	328,129.00	5,879.89
303 303 303	As per Revised Accounting dated 12-4-52 Supplementary Accounting to 7-31-54‡ Supplementary Exhibit "A"		14,602.57 816.39	- 15,661.23	.14,602.57 816.39 — 15,661.23	50% 50% 50%	7,301.29 408.20 - 7,830.62	7,301.29	
		4					-4 121.13 ⁴⁰	7,301.29	7,422.42
1947 303 303 303	As per Revised Accounting dated 12-4-52 Supplementary Accounting to 7-31-54‡ Supplementary Exhibit "A"		1,603,835.56 . 56,393.47	— 31,882.37	1,603,835.56 56,393.47 — 31,882.37	50% 50% 50%	801,917.78 28,196.74 —15,941.19	1,059,951.67	
1,		(Carried Forward)		. •			814,173.33	1,059,951.67	245,778.34
303 FTA	As per Revised Accounting dated 12-4-52 Supplementary Accounting to 7-31-54‡ Supplementary Exhibit "A"			- 14,076.17		=			
1040		(0 . (0	* •		4 4		-		
303 FTA 303 FTA 303 FTA 303 FTA	As per Revised Accounting dated 12-4-52 Brought Forward from 1947 Supplementary Accounting to 7-31-54‡ Brought Forward from 1947 Brought Forward from 1947 Brought Forward from 1947	(Carried Forward) to 1949	- 34,362.83 - 36,483.66 3,064.16 - 229.89	- 50,916.29 - 14,076.17					
							-	21	
1949 303 FTA	A As per Revised Accounting dated 12-4-52 Less Loss Carried forward from 1947-1948		288,399.95 — 70,846.49	•	,		•		P
303 FT	A Supplementary Accounting to 7-31-54‡ Loss Carried forward from 1947	-229.89	217,553.46 671.72		217,553.46	50%	108,776.73	108,776.73	
	Profit Carried forward from 1948	3,064.16	2,834.27	1					**
303 FTA	A Supplementary Exhibit "A" Carried forward from 1947-1948		3,505.99	- 41,897.06 - 64,992.46	3,505.99	50%	1,753.00	12.	
		1.		-106,889.52	-106,889.52	50%	-53,444.76	*	
0			10	, , ,			57,084.97	108,776.73	51,691,76
	TOTAL				2,386,772.53		1,193,386.28	1,504,158.69	310,772.41

^{*}Adjustment necessary to allow 10% net return on "Capital Necessarily Employed" after payment of Federal Income Taxes.

**The figures preceded by a minus sign appear in red on the original accounting.

‡ See Supplementary Schedule "C" attached hereto.

AMERICAN FOREIGN STEAMSHIP CORPORATION

1946,	Warshipdemise 203 Contract No. WSA 13061	Shipsaledemise 303 Contract No. MCe 41726
Allowable Return of 10% per Annum on Capital Necessarily Employed as per Re- vised accounting dated 12-4-52	\$ 19,721,78	\$ 25,552.54
Cumulative Net Voyage Profit as per Resed Accounting dated 12-4-52	675,979.78	40,155.11
Cumulative Net Voyage Profit in excess of 10% per annum of "Capital Necessar- ily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid	\$ 656,258.00	\$ 14,602.57
Supplementary Accounting of Amounts Recorded from 4-1-51 to 7-31-54 Net Voyage Profit	\$ 327.75	\$ 816.39
Less Adjustment necessary to allow 10% net return on "Capital Necessarily Employed" after payment of Federal income taxes	12,087.54	15,661.23
Net Loss	*11,759.79	-14,844.84
To Refund of Overpayment of Additional Charter Hire @ 50%	5,879.89	7,422,42

^{*} The figures preceded by a minus sign appear in red on the original accounting.

AMERICAN FOREIGN STEAMSHIP CORPORATION

1947	Warshipdemise 303 Contract No. MCc 41726	Warshipdemise 303 F.T.A. Contract No. MCc 41726
Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per Revised accounting dated 12-4-52	\$ 52,018.61	\$ 22,966.38
Cumulative Net Voyage Profit as per Revised accounting dated 12-4-52	1,655,854.17	•—13,517.28
Cumulative Net Voyage Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid	\$1,603,835.56	\$-36,48 <u>3</u> .66
Supplementary Accountings for Amounts Recorded from 4-1-51 to 9-31-54	56,393.47	- 229.89
Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Employed" after payment of Federal Income	91 000.97	14.070.17
Taxes Net Profit	\$ 24,511.10	14,076.17
Net Loss (Carried forward to 1948)		\$-14,306.06
Additional Charter Hire @ 50%	\$ 12,255.55	

Supplementary Exhbit "A"

AMERICAN FOREIGN STEAMSHIP CORPORATION

4	SW		0
	9	4	8

	Warshipda 303 F.T. Contract No. M	À.
Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per revised accounting dated 12-4-52-	+	* 83,07 96
Cumulative Net Voyage Profit as per revised accounting dated 12-4-52	* 48,711.13	
Cumulative Net Voyage Loss Plus Allowable Return for 1947 as per revised accounting dated 12-4-52	*\$36,483.66	\$ 12,227.47
Cumulative Net Voyage Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid		\$-70,846.49
Supplementary Accounting for Amounts Recorded from 4-1-51 to 7-31-54	3,064.16	
Cumulative Net Voyage Loss (1947 Supp.) Plus adjustment of Allowable Return after taxes	\$ 14,306.06	-11,241.90
Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Em- ployed" after payment of Federal In- come Taxes	• .	\$-5 0.916.29
Carried forward to 1949		\$ 62,158.19

AMERICAN FOREIGN STEAMSHIP CORPORATION

1949

Warshipdemise 303 F.T.A. Contract No. MCc 41726

Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per Revised accounting dated 12-4-52.

Cumulative Net Voyage Profit as per Revised accounting dated 12-4-52

Net Allowable Return in excess of cumulative Profit for period 1947 and 1948

Cumulative Net Voyage Profit in excess of 10% per Annum of "Captial Necessarily, Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid

Supplementary Accounting for Amounts Recorded from, 4-1-51 to 7-31-54

Cumulative Met Voyage Loss and Adjustments carried forward from 1947 and 1948

Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Employed" after payment of Federal Income Taxes

Net Loss

To refund Overpayment of Additional Charter Hire @ 50%

356,758.32

70,846,49

285,911.83

68,358.37

217,553,46

671.72

62,158.19

-61,486.47

-41.897.06

\$—103,383,53

51,691.76

^{*} The figures preceded by a minus sign appear in red on the original accounting.

Supplementary Schedule "C".

AMERICAN FOREIGN STEAMSHIP CORPORATION

FOR PERIODS ENDED DECEMBER 31, 1946, DECEMBER 31, 1947, DECEMBER 31, 1948, DECEMBER 31, 1949

	1946	0. 1. 1. 1.	1947		1948	1949
	203	303	303	303 FTA	303 FTA	303 FTA
	Contract No. WSA 13061	Contract No. MCc 41726	Contract No. MCc 41726	Contract No. MCc 41726	Contract No. MCe 41726	Contract No. MCe 41726
Cumulative Net Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per Revised Accounting Dated 12-4-52 TERMINATED VOYAGE RESULTS	656,258.00	14,062.57	1,603,835.56	-36,483.66	-34,362.83	217,553.46
Amounts Recorded 4-1-51 to 7-31-54 Revenue Expense	- /		,141.30 ,252.17 56,393.47		-3,064.16 3,064.16	—1,321.25 1,321.25
Inactive Vessel Expense	656,585.75	14,878.96	1,660,229.03	-36,713.55	31,298.67	218,874.71 649.18
Less Adjusted Net Profit on which Additional Charter Hire has been Paid as per Adjusted Accounting	656,585.75	14,878.96	1,660,229.03	-36,713.55	-31,298.67	218,225.18
dated 12-4-52	656,258.00 327.75	14,062.57 816.39	1,603,835.56 56,393.47	—36,483.66 —229.89	$\frac{-34,362.83}{3,064.16}$	217,553.46 671.72

^{*} The figures preceded by a minus sign appear in red on the original accounting.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

A. 183-356

AMERICAN FOREIGN STEAMSHIP CORPORATION, Libelant, - against -

UNITED STATES OF AMERICA, Respondent.

Government's Exception to Amended Libel— Filed September 27, 1955

The respondent, appearing specially, hereby excepts to the amended libel herein on the following ground:

(1) This Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745.

Dated: New York, N. Y. September 27, 1955.

Yours, etc.,

Paul W. Williams
United States Attorney
Proctor for Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: ARTHUR M. BECKER, Esq. Messrs. Foley & Statt Proctors for Libelant 80 Broad Street New York 4, N. Y.

IN UNITED STATES DISTRICT COURT

Affidavit of John E, Griffith

STATE OF NEW YORK SS2

JOHN E. GRIFFITH, being duly sworn, deposes and says:

I am vice-president of the libelant herein. Upon information and belief, the last vessel held under bareboat charter from the United States Maritime Commission was returned to the Maritime Commission December 28, 1949. Thereafter, on February 21, 1950, the United States Maritime Commission issued General Order 60, Supplement 21, which was published in the Federal Register. In accordance with the provisions thereof, on September 21, 1951, libelant made a preliminary payment of \$327,730.16. The said preliminary payment was accompanied by a letter reading as follows:

"September 21, 1951

Mr. J. F. Keating,
District Comptroller
United States Department of Commerce
Maritime Administration
45 Broadway
New York 6, New York

Attention: Mr. T. Conroy

Re: Bareboat Charterers 203 and 303 Agreements—Accounting—Pursuant to Supplement 21 General Order 60

Dear Sir:

We enclose check to the order of the Treasurer of the United States, a/c United States Department of Commerce, Maritime Administration, in the amount of \$327,730.16, together with subject accountings in sextuplicate covering Additional Charter Hire due the Maritime Administration.

This remittance is subject to adjustment upon the completion of final accounting between the American Foreign Steamship Corporation and the Maritime Ad-

21 ministration and neither the tender of such payment by the American Foreign Steamship Corporation, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

American Foreign Steamship Corporation JOHN E. GRIFFITH Vice-President"

Thereafter, and on or about September 21, 1953, libelant made a further preliminary payment of \$3,141.08, subject to the terms and conditions of General Order 60, Supplement 21.

The present suit is for the return of \$310,367.32 from these preliminary payments.

/s/ John E. Griffith

(Verified, April 2, 1956)

虚

IN UNITED STATES DISTRICT COURT

Affidavit of Melvin Spaeth

DISTRICT OF COLUMBIA) SS:

MELVIN SPAETH, being duly sworn, deposes and says:

I am a member of the bar of the District of Columbia and I am associated with the proctor for the libelant herein.

I have examined excerpts from the minutes of the United States Maritime Commission. Those excerpts show:

1. That in the early part of August 1946, the United States Maritime Commission, having indicated its intention to cancel all existing bareboat charters of war built vessels and to require all future charters (from August 31 on) to contain a progressive recapture clause providing for the payment of so-called "additional charter hire" on

- a sliding scale reaching as high as 90 percent of
 the cumulative net profit in excess of 10 percent
 per annum on capital necessarily employed rather
 than at the statutory rate of one-half the cumulative net
 profit in excess of 10 percent per annum on capital
 necessarily employed, various steamship associations, including the Ship Operators Association to which the
 libelant belonged and which acted on its behalf, protested
 the contemplated action;
- 2. That on September 4, 1946, the Maritime Commission rejected the protest of the ship operators, including those representing libelant, to the recapture provisions of the contemplated charter parties but adopted the recommendation of its General Counsel that the clause of the proposed charter party containing the disputed item, i.e., Clause 13, be modified by adding thereto the following:

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshippemiseout) charter (prior to the times of payment provided for above or in such Warshippemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such times and in such charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

The proposed charter as so modified was by direction of the Maritime Commission published in the Federal Register (see 46 C.F.R. § 299.82) and duly executed by libelant and others.

/8/ MELVIN SPAETH

(Verified, April 2, 1956)

IN UNITED STATES DISTRICT COURT

Affidavit of Arthur M. Becker

DISTRICT OF COLUMBIA) 88:

ARTHUR M. BECKER, being duly sworn, deposes and says:

I am proctor for the libelant herein and fully familiar with all the proceedings heretofore had herein. I make this affidavit in opposition to respondent's motion to sustain its exceptions to the amended libel.

At the trial or hearing on the merits of this suit, I intend to prove that preliminary payments of additional charter hire were not treated by the Maritime Commission as payments received for the account of the Government, but on the contrary, were treated by the Maritime Commission, with the approval of the Comptroller General of the United States, as trust funds, received as security so that funds would be available for the payment of additional charter hire when and if such additional charter hire accrued to the Government.

Section 12 (d) of the Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1745(d), provides in pertinent part that;

"All monies received by the [Maritime] Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts."

The Comptroller General ruled, however, that this statutory provision was inapplicable to preliminary payments of additional charter hire because "those receipts did not represent 'earned' moneys when first received." 33 Dec. Comp. Gen. 503, at 504 (1954). Instead, the Comptroller General authorized these payments to be held in a special "trust account," entitled "13X6869 Unearned Moneys Merchant Ship Sales, War-built Vessel Department of Commerce."

Upon information and belief, preliminary payments of additional charter hire were maintained in this trust account until such time as there was a final audit of the charterer's accounts, at which time the Maritime Commission assessed what was due to the Government and what was due to the charterer. The source of

my information and the grounds for my belief with respect to the foregoing is an investigation conducted by my staff, as well as the published opinion of the Comptroller General, 33 Dec. Comp. Gen. 503, at 504 (1954). This investigation disclosed, among other things, that upon the audit of the final accounting, as prescribed in General Order 60, Supplement 21, the Maritime Commission refunded out of the trust account what it regarded as excessive preliminary payments of additional charter hire. Attached hereto, as an example of such a refund, is a photostatic copy of the payee's copy of a public voucher of the Polarus Steamship Co., Inc., 30 Broad Street, New York, New York. Attention is called to the legend under Articles or Services reading as follows:

"Claim for refund of excess of preliminary payments made to the U. S. Maritime Administration on account of additional charter hire, over the amount of such additional charter hire indicated to be due the Administration for the period from January 1, 1951 to July 31, 1951 under Bareboat Charter Agreement Shipsalesdemise 303, E.C.A., Contract No. MCc-62763 as per accounting rendered pursuant to General Order No. 60, Supplement No. 21, which, by this reference, is incorporated in this claim for refund.

Total amount preliminary payments
Total amount due per final accounting
Balance due Polarus Steamship Co., Inc.
Total.

\$51,105.78
27,762.87
\$23,342.91"

Attention is also called to the legend "Appropriation title". reading as follows:

"13X6869 Unearned Money's Merchants Ship Sales, War-Built Vessel Department of Commerce"

This Account No. 13X6869 Unearned Moneys, Merchant Ship Sales, War-Built Vessels is the trust account 25 described by the Comptroller General in the opinion set forth above. My office has in its possession fifteen other similar vouchers indicating refunds of preliminary payments of additional charter hire to eight different steamship companies, all out of the same trust account. It is therefore plain that the Maritime Commission did not

treat the preliminary payments of additional charter hire as "monies received" by the Government until such time as its final audit of the accounts, at which time the charterer became entitled, under the terms of the charter agreement and the various regulations, to the return of any excessive preliminary payment.

(S/ ARTHUR M. BECKER .

(Verified, April 28, 1956)

Exhibit to Affidavit of Arthur M. Becker

PUBLIC VOUCHER FOR PURCHASES AND SERVICES
OTHER THAN PERSONAL

Voucher prepared at New York, N. Y. March 15, 1953

To Polarus Steamship Co., Inc. Address 30 Broad Street, New York, N. Y.

Claim for refund of excess of preliminary payments made to the U. S. Maritime Administration on account of additional charter hire, over the amount of such additional charter hire indicated to be due the Administration for the period from January 1, 1951 to July 31, 1951 under Bareboat Charter Agreement Shipsalesdemise 303, E.C.A., Contract No. MCc-62763 as per accounting rendered pursuant to General Order No. 60, Supplement No. 21, which, by this reference, is incorporated in this claim for refund.

Total amount preliminary payments

Total amount due per final accounting

Balance due Polarus Steamship Co., Inc.

Total

\$51,105.78 27#62.87

\$23,342.91

Polarus Steamship Co., Inc.
Original Signed by S. J. Lapisardi, Comptroller
Account verified; correct for 23,342.91
(Signature or initials) CEM

MEMORANDUM

13X6869 Unearned Money's Merchants Ship Sales War-Built Vessel Department of Commerce

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 24200

STOCKARD STEAMSHIP CORPORATION, Libelant-Appellant, against

UNITED STATES OF AMERICA, Respondent-Appellee.

Appendices to Appellant's Brief-Filed October 2, 1856

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IN UNITED STATES DISTRICT COURT

Libel-Filed October 5, 1954

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AD. 183-200

The Libel and Complaint of STOCKARD STEAMSHIP CORPORATION, 17 Battery Place, New York 4, New York,

against

THE UNITED STATES OF AMERICA, in causes of contract, civil and maritime, respectfully alleges upon information and belief, as follows:

First: That libelant, Stockard Steamship Corporation, is a corporation organized and existing under the laws of the State of New York, having its principal place of business in New York, New York.

SECOND: That respondent is the United States of America, a sovereign state, which has consented to be sued under the provisions of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. § 741, et seq.). The Maritime Administration, U. S. Department of Commerce (successor to the U. S. Maritime Commission), is an instrumentality and agency of respondent.

THIRD: That, pursuant to the provisions of the Merchant Ship Sales Act of 1946 (60 Stat. 41), respondent was authorized to charter certain war-built vessels on a bareboat basis to citizens of the United States. Section 5 of that Act provided in part as follows:

- "Sec. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.
- "(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in the subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.
- "(c) The provisions of Sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall beapplicable to charters made under this section."

FOURTH: That Section 709 of the Merchant Marine Act, 1936 (49 Stat. 1985) as amended, the terms of which were

incorporated by reference in Section 5(c) of the Merchant Ship Sales Act, 1946, quoted above, provides in part as follows:

- "Sec. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such chapter, the cumulative net voyage profits (after payment of the charter hire received in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire. one-half of such cumulative net voyage profit in excess of 10 per centum per annum: Provided, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years,
 - "(b) Every charter shall contain a definition of the terms 'net voyage profit' and 'fair and reasonable overhead expenses', and 'capital necessarily employed', as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expenses and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter."

FIFTH: That bareboat charter contracts MCc-41728, MCc-62623 and MCc-62752 were prepared by respondent purportedly in accordance with the aforesaid provisions of law and tendered to libelant for execution as a condition precedent to the allocation of the vessels under bareboat charter. Accordingly, said contracts were executed by libelant and respondent on September 2, 1946, August 21, 1950, and January 5, 1951, respectively.

Sixth: That notwithstanding the mandatory provisions of law aforesaid, the said contracts, which were the same in substance as the standard form prepared by respondent and a complete copy of which will be

made available at the trial of this matter, provided in Clause 13 in part as follows:

"CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shaff exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum . on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of \$100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$100 per day but not in excess of \$300 per day—75% on such excess over \$100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$300 per day—90% on such excess of \$300 per day."

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshippemiseout) charter (prior to the times of payment provided for above or in such

(Warshippemistour charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

SEVENTH: That pursuant to the aforesaid Clause 13 in each of the charters, and the accounting regulations promulgated and prescribed by respondent, the respondent required the libelant from time to time to submit preliminary accounting statements based upon the computation of additional charter hire in excess of the maximum amount of one-balf of the cumulative net voyage profit after 10% of the charterer's capital necessarily employed, permitted under Section 709 of the Merchant Marine Act, 1936.

EIGHTH: That respondent refused to permit libelant in the computation of additional charter hire to apply net voyage profits earned in certain years against net voyage losses sustained in the next subsequent year (as indicated by the Schedule "A" annexed hereto and incorporated herein), despite the fact that both the law and the contract provisions aforesaid provided for additional charter hire to be computed on a cumulative basis.

NINTH: That from time to time, libelant, without agreeing to said accounting regulations and methods, was required to make certain payments on account, based upon the accountings prepared by respondent.

TENTH: That as a result, respondent has wrongfully required libelant to pay additional charter hire in excess of the amount permitted under the aforesaid Section 709, in the amount of approximately \$458,037.99.

ELEVENTH: That although daily demanded by libelant, respondent has refused and continues to refuse to make any further adjustments in the accountings and to make reimbursement of the aforesaid amount of additional charter hire which was exacted contrary to law.

Twelfth: That by reason of the premises, libelant has been damaged in the aggregate amount of \$458,037.99, which sum has been demanded and is presently due and owing by respondent to libelant.

THIRTEENTH: That the accountings of libelant referred to above were submitted to and reviewed by respondent, with the understanding that they were without prejudice to such further adjustments as might be warranted under the terms of the charter and pursuant to, law. Libelant alleges, on information and belief, that there are or may be developed in further consideration of said accountings, items of controversy between libelant and respondent, and libelant accordingly reserves the right to amend this libel to include such items of controversy, and to increase the amount of damages demanded, as may be necessary and appropriate.

FOURTEENTH: That libelant has duly performed all and singular the obligations resting on it under the contract.

33 FIFTERNTH: That all and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that upon service of a copy of this libel on the United States Attorney for this district, and the mailing of a copy thereof to the Attorney General of the United States, in accordance with law, respondent, The United States of America, be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court be pleased to decree to your libelant damages in the amount of \$458,037.99, together with such interest as is allowable thereon for delay in payment thereof, as well

as costs, and that your libelant may have such other and further relief as in law and justice it may be entitled to receive.

ZOCK & PETRIE Proctors for Libelant Office & P. O. Address 52 Broadway New York 4, New York

RADNER, ZITO, KOMINERS & FORT Of Counsel Office & P. O. Address Tower Building 1401 K Street, N. W. Washington 5, D. C.

Schedule "A" to Libel

Stockard Steamship Corporation

Extract from Report Rendered District Comptroller, U. S. Department of Commerce, Maritime Administration, New York May 11, 1954 Submitted in accordance with General Order No. 60 Supplement 21 (Exhibit C-1948)

Contract · Shipsalesdemise 303 MC 41728

Income Sheet for the Period January 1, 1948 to December 31, 1948 before Additional Charter Hire and Federal Income Taxes

TERMINATED VOYAGE RESULT		A
Revenue \$125,568.00 Expenses (181,187.27)		
Gross Profit (Loss) from Vessel Operations	(*	55,619.27)
Overhead		
Administrative and General Expense Net . \$ 6,458.02 Advertising Expenses		
cluding N. Y. State Credit 284.60	. (.	6,221.51)
Gross Profit or (Loss) from Shipping Operations before Depreciation	(\$	61,840.78)
DEPRECIATION—SHIPPING PROPERTY	1.	
Other Shipping Property and Equipment	.(/	134.28)
Gross Profit or (Loss) from Shipping Operations	1(\$	61,975.06)
OTHER INCOME Interest Earned	/	214.67
Loss	(\$	61,760.39)
OTHER DEDUCTIONS FROM INCOME		
Interest Expense \$ 277.20	,	
Post Redelivery Overhead	.(\$	1,163.45)
Net Loss on Contract	(\$	62,923.84)
		2 .
Note: Overhead etc. allocated per formula		. 44'
Application of Carry Back of Loss 1948		
Excess Profits Contract MCe41728 period 1/1-12/31/47	41	000 555 00
per Report 5/11/54		882,757.03 62,923.84)
Adjusted Excess Profits subject to additional charter hire	\$1,	819,833.19

) = loss or expense]

Duly sworn to by J. O. Wroldsen jurat omitted in printing

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IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

A. 183-200

STOCKARD STEAMSHIP CORPORATION, Libelant,

against

UNITED STATES OF AMERICA, Respondent.

Respondent's Exceptive Allegations to Libel of Stockard Steamship Corporation—Filed March 27, 1956

TO THE HONORABLE THE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

The respondent, for its exceptive allegations, alleges:

- 1. On September 2, 1946, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant executed bareboat charter bearing No. MCc-41728 pursuant to which the respondent agreed to charter certain vessels to libelant upon the terms and conditions set forth in said charter.
- 2. Pursuant to the terms and provisions of said charter and certain addenda thereto, respondent delivered certain vessels to the libelant and annexed hereto, marked Schedule A and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by said libelant.
 - 3. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda to said charter were redelivered by said libelant to the respondent by December 13, 1949.
 - Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant,

the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on December 13, 1949, the date of the redelivery of the last of the vessels chartered to libelant.

- 5. On August 21, 1950, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant executed bareboat charter bearing No. MCc-62623 pursuant to which the respondent agreed to charter certain vessels to said libelant upon the terms and conditions set forth in said charter.
- 6. Pursuant to the terms and provisions of said charter and certain addenda thereto, respondent delivered certain vessels to the libelant and annexed hereto, marked Schedule B and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by libelant.
- 7. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda to said charter were redelivered by libelant to the respondent by February 11, 1952.
- 8. Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant, the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on February 11, 1952, the date of the redelivery of the last of the vessels chartered to libelant.
- 9. On January 5, 1951, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant

executed bareboat charter bearing No. MCc-62752
38 pursuant to which the respondent agreed to charter certain vessels to libelant upon the terms and conditions set forth in said charter.

10. Pursuant, to the terms and provisions of said charter and certain addenda thereto, respondent delivered

certain vessels to the libelant and annexed hereto, marked Schalule C and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by libelant.

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- 11. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda of said charter were redelivered by libelant to the respondent by March 19, 1951.
- 12. Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant, the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on March 19, 1951, the date of the redelivery of the last of the vessels chartered to libelant.
- 13. By reason of the premises this Honorable Court lacks jurisdiction over the subject matter and over the respondent because suit was not instituted by libelant against the respondent within two years after libelant's alleged causes of action arose, as required under Section 5 of the Suits in Admiralty Act of March 9, 1920, as amended, 46 U. S. C. 745.

WHEREFORE, respondent plays that the libel herein be dismissed with costs.

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

Schedule A to Respondent's Exceptive Allegations Etc.

Vessel	Date of Delivery	Date of Redelivery
Arunah S. Abell	September 9, 1946	October 21, 1947
Charles N. Cole	October 3, 1946	January 22, 1948
Fred E. Joyce	September 21, 1946	October 30, 1947
George Durant	September 14, 1946	October 23, 1947
George N. Segar	September 3, 1946	September 24, 1948
John Ireland	September 21, 1946	February 6, 1948
John L. Elliott	October 1, 1946	December 12, 1946
Samuel Blatchford .	December 12, 1946	September 23, 1948
W. S. Jennings	September 17, 1946	December 13, 1949
Wendell L. Wilkie	November 16, 1946	July 22, 1949
Charles Piez	December 27, 1946	October 28, 1947
Clifford E. Ashby	November 20, 1946	August 23, 1949
Florence Martus	September 26, 1946	November 18, 1947
Frederick Remington	November 15, 1946	July 23, 1949
Herman Melville	November 13, 1946	November 1, 1949
James B. Richardson	January 12, 1947	March 12, 1948
Joseph C. Lincoln	September 26, 1946	November 28, 1949
Louisa M. Alcott	December 28, 1946	September 16, 1947
Patrick S. Mahorey	January 31, 1947	November 22, 1947
William Wilkins	December 27, 1946	July 12, 1949
	Schedule B	-/ 10
Red Oak Victory	August 29, 1950	February 11, 1952
Duke Victory	August 23, 1950	October 29, 1951
Norwich Victory	March 17, 1951	November 7, 1951
	Schedule C	
Niagara Victory	January 12, 1951	March 19, 1951
		1

Exhibit 1

RELEVANT CHARTER PROVISIONS

CLAUSE 2. Surveys. (a) The Vessels shall be jointly. surveyed before delivery (unless fully surveyed under an immediately preceding WSA Form 203 charter WARSHIP-DEMISEOUT entered into between the parties) and before redelivery under this Agreement to determine and state the condition of the Vessels. Such surveys shall include dry-docking to determine and state the condition of the underwater parts, unless, at owner's option, the dry-docking in connection with delivery is postponed, in which event the cost and time of any damage to underwater parts found either upon redelivery or during the period of the Vessel's use under this Agreement shall be for Owner's account unless such damage is established, from the basis of all evidence, to have occur, ad during the period of the Vessel's use under this Agreement or under any immediately preceding Warshippemiseour Form 203 charter entered into between the parties. The cost and time of such delivery survey shall be for the account of the Owner, and similarly the cost and time of such redelivery survey shall be for the account of the Charterer.

(b) Subject to the foregoing provisions as to underwater parts in the event dry-docking is postponed, and except as to items noted on the delivery survey report as defective, the delivery of the Vessel by the Owner and the acceptance thereof by the Charterer shall constitute full performance by the Owner of all the Owner's obligations under Clause 1, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any agreements, representations or warranties, expressed or implied, with respect to the condition of the Vessel; provided, however, that the Owner shall neverthe-

less be responsible for the cost and time of repairs or 41 renewals occasioned by latent defects in the Vessel, its machinery or appurtenances or defects due to locked in stresses in the Vessel existing at the time of delivery, not recoverable under the terms and conditions of the American Hull form of policy (American Institute of Marine Underwriters 7/1/41) containing no deductible average clause. For the purposes of this clause and of the Charter the delivery survey held for the immediately preceding Warshippemiseour form shall be deemed to be the delivery survey, under this Charter.

CLAUSE 4. Inventory. A complete inventory of the Vessel's entire, outfit, equipment, furniture, furnishings appliances, spare and replacement parts and of all unbroached consumable stores, slop chest and fuel on board shall be jointly taken at the time of delivery, and mutually agreed upon as to items, by representatives of the Charterer and the Owner, and a similar inventory shall be taken and mutually agreed upon at the time of redelivery. The parties may agree, however, to accept any suitable prior inventory which may have been taken before the delivery of the Vessel under this Agreement, either on the occasion of the redelivery of the Vessel from a general agency agreement with the Owner, or otherwise.

CLAUSE 5: Consumable stores and fuel. The Charterer. shall accept and pay for all unbroached consumable stores and fuel on board at the time of delivery (unless the vessel was under Warshipdemiseout 203 form of charter entered into between the parties) and the Owner shall accept and pay for all unbroached consumable stores (with the exception of perishable stores, broached or unbroached, and slop chests, in the event the Vessel is redelivered at a port regularly serviced by the Charterer or at the port of redelivery provided for in Clause G of Part I hereof) and fuel on board (but not in excess of vessel's normal requirements in accordance with good operating practice), at the time of redelivery at the market prices current at the ports and times of delivery and of redelivery, respectively. "Consumable stores" within the meaning of this agreement shall mean all consumable and subsistence stores, and returnable containers (but not expendable equipment, scrap and junk) listed in the United States Maritime Commission Voyage Stores Reports, Forms 7915A, 7916A, 7918A and 7919A (Revised Forms 1939), and slop chests.

CLAUSE 6. Use of equipment. The Charterer shall have the use of all outfit, equipment, furniture, furnishings, appliances, spare and replacement parts on hoard the Vessel at the time of delivery under this Agreement or any immediately preceding WARSHIPDEMISEOUT 203 form of charter between the parties, without extra cost and the same shall be returned to the Owner on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. Any such items damaged or so worn in service as to be unfit for use (unless through ordinary wear and tear) or lost or destroyed shall be replaced or made good by the Charterer in kind at or before redelivery, or at Owner's option, the Charterer shall pay for said items at the current market prices at the port and time of redelivery. Any overages accepted by the Owner shall be paid for at the current market prices at the port and time of redelivery.

CLAUSE 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of delivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be

made to the Owner at Washington, D.C., on delivery 43 of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington,

D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentage of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of \$100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$100 per day but not in excess of \$300 per day—75% on such excess over \$100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$300 per day—90% on such excess over \$300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WAR-SHIPPEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDE-MISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

CLAUSE 15 Redelivery of Vessel. The Vessels shall be redelivered to the Owner (unless lost) pursuant to the terms of this Agreement in the same or as good order, condition and class as that in which they were delivered,

unless the lack of good order, condition and class is due solely to ordinary wear and tear. At the redelivery survey provided for in Clause 2, surveyors representing both the Charterer and the Owner, or a surveyor satisfactory to both sides, shall be present, who shall determine and state the repairs or work necessary to place the Vessel on the date of redelivery in the condition and class required in this paragraph which findings shall include all repairs or work (as distinguished from postponed annual or periodical surveys) required by outstanding classification or marine inspection requirements of the Coast Guard, Treasury Department, in effect as of date of delivery to place her in such condition. The Charterer, before redelivery, shall make all such repairs and do all such work so found to be necessary at its expense and time, or at Owner's option, the Charterer shall on Owner's request discharge such obligation by payment to the Owner of an amount sufficient to place the Vessel in such condition and class and to provide for the foregoing work and repairs at the prices

current at the time of redelivery, which amount shall also include compensation at the rate of basic hire payable under this Agreement for the time reasonably required under then existing conditions to complete such work or repairs and compensation for other expenses (including insurance) incident to such work or repairs or which would have been borne by the Charterer if the repairs had been effected prior to redelivery. The Charterer shall not be required to make any repairs or to satisfy any classification or marine inspection requirements of the Coast Guard, Treasury Department, which were for Owner's account under Clause 2 of this Agreement but if such repairs were made or such requirements were satisfied after delivery under this Agreement and paid for by the Owner, they shall be considered as having been made at the time of delivery for the purpose of determining the Charterer's obligations under this Clause 15. In the case of any vessel which was under an immediately preceding Warshipdemiseout 203 form of charter entered into by the War Shipping Administration and the Charterer the date of delivery referred to in this clause shall be deemed to be the date of delivery under such prior charter.

CLAUSE 23. Definitions. The terms "not voyage profit", "fair and reasonable overhead expenses", and "capital necessarily employed" as used herein with respect to the operations of the Vessel and services incident thereto are hereby defined, for the purpose of this Agreement only, as follows:

(a) "Net Voyage Profit" shall be determined by deducting from gross income, as hereinafter defined. such direct vessel operating expenses, terminal and other auxiliary operating expenses, overhead expenses, interest expense, amortization of deferred charges, depreciation on property utilized in the operation of the vessels, and all other charges which are customarily made in accordance with sound accounting practice in determining net profits before provision for federal income taxes, all as the Owner may deem fair and reasonable, provided, that in instances where the Charterer engages in other activities in addition to the operation of the Vessels covered by this Agreement. such charges, other than those directly and exclusively, allocable to the operation of the Vessels shall be prorated between these activities on such basis as the Owner may determine to be fair and reasonable.

"Gross Income" shall include such items as revenue earned from the carriage of cargo, passengers, and mail, terminal and other auxiliary operations and miscellaneous profits and losses, such as those arising from pooling agreements, advance and prepaid beyond items, bar and slop chest, and such other transactions as the Owner may determine are properly included. "Gross Income" shall include also interest earned, dividends received, and other non-operating income, as well as all accruals to the Charterer as an operating-differential subsidy. If the Charterer engages in any other activities in addition to the operation of the Vessels, the revenues and miscellaneous income, other than those exclusively applicable to the operation of the Vessels, shall be prorated between these activities, on such basis as the Owner may determine to be fair and reasonable.

Income consisting of capital gains and expenses consisting of capital losses shall in no event be included in the computation of "Net Voyage Profit", as above defined.

Income from and expenses attributable to assets, other than the Vessels, excluded in the computation of "Capital Necessarily Employed", as hereinafter defined, shall not be included in the computation of "Net Voyage Profit", as above defined.

(b) "Fair and Reasonable Overhead Expenses" shall include those expenses actually and necessarily incurred in the conduct of the business of operating the Vessels, such as salaries of officers; wages of employees; legal and accounting fees and expenses; rent. heat, light, and power; communication expenses; office supplies, stationery, and printing; membership dues and subscriptions, entertaining and solicitation; traveling expenses; insurance and bond premiums; postage; maintenance of office equipment; and miscellaneous administrative and general expenses, all as the Owner may determine to be fair and reasonable and properly included, provided, that there shall be deducted from the total of such expenses (1) the amount by which wages, salary, and allowances of compensation in any form for personal services received by any director, officer or employee (which term shall be construed in the broadest sense to include. but not to be limited to, managing trustees or other administrative agents) from the charterer and its affiliates, subsidiaries, and associates, directly or indirectly. shall in any instance exceed the amount of \$25,000 per annum, prorated to the period of the agreement, and (2) agency fees, commissions, brokerage, and such other miscellaneous earnings as the Owner may determine to be properly deductible.

"Fair and Reasonable Overhead Expenses" shall include also freight, passenger, and other expenses incident to advertising the Vessels and the lines served by them; taxes, other than federal income taxes; and management and operating commissions, but only if and in the cases where the express written consent of the Owner has been given the Charterer to employ any

other person or concern as the managing or operating agent of the Charterer; all as the Owner may determine to be fair and reasonable and properly included.

If the Charterer engages in other activities in addition to the Operation of the Vessels, the "Fair and Reasonable Overhead Expenses" other than those directly and exclusively allocable to the Operation of the Vessels shall be prorated between such activities on such basis as the Owner may determine to be fair and reasonable.

(c) "Capital Necessarily Employed" shall be determined upon the basis of the net worth reported by the Charterer in its balance sheet as of the close of the month preceding the date of delivery of the first Vessel under this Agreement, adjusted as hereinafter pro-For the purpose of this determination, net worth, as stated in the balance sheet of the Charterer. shall be deemed to include capital stock, surplus and such subdivisions thereof as capital surplus, earned surplus, and accounts of like nature. Net worth, as thus stated, shall be adjusted in such manner as the Owner may determine to be fair and reasonable, including the elimination of appreciation adequate statement of the liabilities and such other adjustments as are. consistent with sound accounting principles. In the computation of "Capital Necessarily Employed" good will, intangibles not actually purchased and paid for, and stock held in treasury shall be excluded.

Property and other assets utilized in the operation of the Vessels shall be valued at cost, including betterments and reconditioning costs, to the present owner or to any former owner at any time affiliated or associated directly or indirectly with the present owner, whichever is the lower, less depreciation; provided, that, the cost of acquisition of assets acquired in exchange for capital shares or other securities of the Charterer from other than holding, subsidiary, affiliated, or associated companies, shall not be in excess of the fair value of such property at the date of ac-

quisition.

Additional capital, in the form of cash or tangible property paid in during the charter period, shall be

49

50

included in the computation of "Capital Necessarily Employed" from the date paid in. Conversely, any withdrawals of capital shall be deducted from the date withdrawn; provided, however, that no capital shall be withdrawn and no share capital shall be converted into debt without the prior written approval of the Owner. Earnings and capital gains (or losses) for any accounting period subsequent to the last day of the month preceding the month during which delivery of the first Vessel is made hereunder to the Charterer by the Owner, shall not be included in the computation of the "Capital Necessarily Employed" for the year or other accounting period in which realized (or sustained). Dividends paid out of earnings that have not been included in "Capital Employed" shall not be deducted from "Capital Employed".

If the Charterer engages in other activities in addition to the operation of the Vessels, the Owner shall determine the proper allocation of capital as between such activities. The amount so allocated to the operation of the Vessels shall be deemed to be the "Capital"

Necessarily Employed".

CLAUSE 28. Accounting, Report and Supervision. (a) The Charterer and, to the extent required by the Owner, every affiliate, domestic agent, subsidiary, or holding company connected with, or directly or indirectly controlling or controlled by the Charterer

(1) shall keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in accordance with the "Uniform System of Accounts for Operating-Differential Subsidy Contractors" prescribed by the United States Maritime Commission in its General Order No. 22 and under such regulations as may be prescribed by the Owner: provided, however, that, if the Charterer is subject to the jurisdiction of the Interstate Commerce Commission, the Owner shall not require the duplication of books, records, and

accounts required to be kept in some other form by that Commission; and

- (2) shall file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, memoranda of any facts and transactions, which in the opinion of the Owner affect the financial results in, the performance of, or transactions or operations under, this Agreement.
- (b) The Owner is hereby authorized to examine and audit the books, records, and accounts of all persons referred to above in this Clause whenever it may deem it necessary or desirable, including an analysis of the surplus and all supporting accounts. The Charterer agrees to allow any and all auditors, inspectors, attorneys, and other employees, designated by the Owner, full, free and complete access at all reasonable times, to the Vessels when in port or undergoing repairs and to all books, records, papers, memoranda or other documents of the Charterer wherever located or of any holding company, subsidiary company or affiliated company of the Charterer pertaining to any activities relating in any way to the Vessel, and further agrees to permit the making of photostatic or other copies of any such books, records, papers, memoranda or other documents and to furnish without charge adequate office space and other facilities reasonably required by such auditors, attorneys, or inspectors in the performance of their duties. The Charterer further agrees to establish and maintain from time to time such checks upon or systems of control of expenditures or revenues in connection with the operation of the Vessels as the Owner may request.

CLAUSE 29. Termination of Business. Upon termination of this Agreement, the Charterer shall turn over to the Owner, at such time and at such place as the Owner may direct, the Vessel and all property of whatsoever nature, which the Owner may theretofore have delivered to the Charterer or to which the Owner is entitled under the terms

of this Agreement, and the Charterer shall at its own expense make to the Owner such accounting as the Owner may require of all matters arising out of the operation of the Vessels and this Agreement, and shall adjust, settle, and liquidate such accounts, provided, however, that the Owner may collect directly all freight moneys or other debts remaining unpaid and apply any moneys collected on any unpaid balance due from the Charterer to the Owner. All expenses of such collection shall be for the account of the Charterer.

Exhibit 3

IN UNITED STATES DISTRICT COURT

OPEN ACCOUNT STATEMENT SHOWING ITEMS PAID, DEBITED, OR CREDITED, IN ACCOUNTS BETWEEN THE MARITIME ADMINISTRATION AND STOCKARD, TOGETHER WITH LETTERS AND SCHEDULES.

1		* O ******	TO MENTALLING TRANSPORT OF THE PARTY OF THE						
Note Refer- ences	Date	Additional Charter Hire	Inventory Shortages	Repairing Defects Noted on Redelivery	Additional Charter Hire	Inventory Overages	Redelivery Diversion Expense	Other	Net Payment
	Various dates between December 31, 1946, and					1			
				1				-	\$1.239.411.68
	eive	\$1,239,411.68	L	11	1.1	1	1	1	187,100.62
	January 2, 1948	160.778.69	11	1	l	1	1	1	160,778.69
	April 20, 1948	25,759.82		1	\$ 5,699.60	1	1	11	50.566.39
-	April 20, 1948	50,566.39		1.	1			1	4.344.3
	July 6, 1948	4,344,33	Ĺ		R 940 95	1 1	1	1	37,101.9
4 1	August 31, 1948	16 660 99		1	-	-1	1	1	16,860.99
-	May 31 1949	32,363.94		1.1.	1	1	1	1	32,363.94
	June 30, 1949	8,422.70		-	1	1	Į I	-	70.646.3
	July 31, 1949	70,646.35		T	00000	1	11	1	297,059
-		305,433.71	. 1	T.	8,374.48	1.1	1 1	1	13,487.90
	September 30, 1949	13,487.90	00000	40 079 78	955 04	£193 151 98	452.563.94	\$130,994.60	122,285.9
63	Februarg, 28, 1951	245,969.20	\$177,808.80	60,000,00	20000			. 1	19,596.6
-	May 28, 1951	19,596.66	1	1			1	1	27,807.44
	July 31, 1951	27,807.44	1			1	1	1	1,462.0
	August 16, 1951	1,462.05	1		18 330 51	1	4	1	1
	February 13, 1952	910 00			100000	1	1	1	312.22
	February 27, 1952	197 557 90		1	1	22,121.85	36,975.99	1	68,459.36
0 4	Tune 92 1052	1	9,390.76	1	1,372.75	1	1	1	3,018.01
	December 17, 1953	1	8,742.91	1	1	23,178.90	1		7.038.36
	December 01 1052	1	19.535.07	1	1	20,070.40	۲		

Noves: For detail, see Stockard's letters and supporting follows:

1. August 31, 1949, page 22b.
2. February 28, 1951, page 25b.
3. March 17, 1953, page 29b.
4. June 23, 1953, page 31b.

Chief, Burean of Finance United States Maritime Commission Department of Commerce Washington 25, D. C.

Dear Sir:

Re: Preliminary Determination and payment of Additional Charter Hire under Agreement Shipsales-demise—Foreign Trade Addendum

We are enclosing herewith the following schedules prepared in accordance with Supplement No. 8—General Order No. 60 covering all contracts for the years 1946-1949 inclusive. These schedules are being submitted pursuant to preliminary and tentative instructions issued by the Commission in General Order No. 60, Supplement No. 8 with express understanding that their observance by Charterers shall not prejudice Charterers rights under applicable laws and Charter Agreement, or otherwise. All contracts to December 31, 1948 have been revised to reflect the results as at June 30, 1949:

as at June 50, 1010.	Amount due You	Amount due Us
Contract 203—1946		\$ 8,374.48 6,352.44
FTA 1947	\$ 7,904.90 213,591.05	3,210.02
Contract 303—1948 (no balance due)	\$221,495.95	\$ 22,397.37 199,098.58
	\$221,495.95	\$221,495.95

In our letter of February 28, 1949 we submitted to you revised statements covering all contracts as at December 31, 1948 showing a balance due us of \$86,806.98, upon which settlement had been deferred in view of the fact

that our statements included accountings for the SS. James B. Richardson which were under discussion with your Legal Department. These accounts contained a carry-back of loss on this vessel under Contract 303 from 1948 to 1947 which you had previously advised us was contrary to the United States Maritime Commission's prescribed accounting procedure.

The statements which we now submit have been corrected to reflect the result of the SS. James B. Richardson in accordance with letter dated August 10, 1949 which we received from Mr. Elmer-Metz, Assistant General Counsel for United States Maritime Commission, Washington, D. C. The statements reflect previous payments covering operations to December 31, 1948 as follows:

Our check #25786, August 31, 1948 \$37,101.98 27987 January 31, 1949 16,860.99

You will note from the above tabulation that we have rendered statement for Contract 303 for the year 1948 showing no charter hire due. This particular statement is necessary in view of the termination of the SS. James B. Richardson in March, 1948. However, if you will refer to our letter to you of August 31, 1948 with remittance of \$37,101.98, you will note that we have made a deduction therefrom of \$97,960.65 representing Contract 303 for 1947 with adjustments to March 31, 1948.

In view of the fact that the revised accounting which we submit herewith in accordance with Mr. Metz's letter indicates no charter hire due, we are including this amount in our present remittance. We are therefore enclosing

herewith our check #30828 to your order for \$297,059.23 which represents the balance due you on all contracts to date.

Very truly yours,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN, Comptroller.

EMS:HH Enc. District Auditor
U. S. Department of Commerce
Maritime Administration
45 Broadway
New York, N. Y.
Attn: Mr. T. N. Conroy

Dear Sir:

Re: Statements to be Submitted in Accordance With General Order 60 Supplement 21

We are enclosing herewith six copies of the above accounts covering bareboat operations under charter contracts WSA-12933 and MCc-41728 for the period May 7, 1946 to December 31, 1946, prepared and certified by Arthur Andersen & Co. Also supplementing this account, is enclosed five penciled copies of vessel day formula (Exhibit D), which we are advised by Arthur Andersen &

Co. are also required by you.

We have also prepared and enclose herewith four copies of Account Current as at December 31, 1950 indicating charter hire due you in accordance with Arthur Andersen & Co.'s report, taking into consideration payments on account, redelivery diversion expenses, inventories of consumable stores on delivery and redelivery, unpaid public vouchers covering General Agents compensation liquidation fees, etc., and balance to be considered covering items pending or in dispute with the Maritime Administration, such as latent defects, vessel deficiencies and allowance for difference in delivery and redelivery equipment inventories.

You will also find schedules in support of the Account Current detailing the various items included therein, also

public Voucher #612 covering diversion expenses included in the calculation of additional charter hire.

The Account Current Statement indicates a balance due you of \$122,285.99 and our check #34608 to the order of the U.S. Department of Commerce, Maritime Administration is enclosed herewith in settlement.

A typographical mistake; should be 1949.

These schedules are being submitted in accordance with General Order 60 Supplement 23 with express understanding that their observance by Charterers shall not prejudice Charterers rights under applicable laws and Charter Agreement, or otherwise.

Yours very truly,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN, Comptroller.

EMS:HA Enc.

58 STOCKARD STEAMSHIP CORPO	RATION	
Account Current as at December 31, 1950 with of Commerce—Maritime Administ	tration	rtment
	Dr.	Cr.
Additional charter hire due per attached	8,	
Statements prepared in accordance with		/ 1.
General Order 60 Supplement 21:	9	-
Contract 203—1946: 418,006.41		1 1
" 303—1946 160,338.66		8 7
303—1947 1,230,813.74		
" FTA—1947 34,120.55		4 min
" FTA-1948 287,264.35		- 1
FTA-1949 253,630.51	- '/	1
2,384,174.22		
Less total payments to date 2,138,205.02		245,969 20
Public Voucher No. 612—Redelivery Diver-		2.
eion Expenses included in calculation—		
additional charter hire above-attached	52,563.94	
Inventories Consumables per attached State-		
ments: Delivery on Bareboat Contracts		177,808.80
Redelivery from Bareboat Contracts	123,151.28	*
Redenyery from Dareboat Contract	31	9

	Dr.	Gr.
Additional Charter Hire adjustments under G. O. 60 Item 21 giving effect to Latent Defects, Vessel Deficiencies and Expendable Equipment Inventories pending negotiations with Dept. of Commerce, per attached schedules	42,453.18	~
Statement of unpaid Public Vouchers covering General Agents compensation, liquidation fees, and purchase contract items	88,541.42	
Allowance for incompleted repairs SS. Patrick S. Mahoney per addendum to condition survey on redelivery of vessel, not billed us by Maritime Commission:	4.	
Repairs allowance 4,000.00 59 Expenses G. O. 60 Supp. 5: 532.50 Charter Hire 532.50 Misc. Expenses 400.00		4,932.50
(Included in G. O. 60 Supp. 21 Additional Charter Hire)		
U. S. M. C. Bill 4/20/50—No. 010-171 Redelivery repairs allowance S. Joseph C. Lincoln		1,141.25
Additional charter hire on above item @ 75%	. 855.94	1 - 1
Balance Due°	307,565.76 122,28 5 .99	429,851.75
	429,851.75	429,851.75

STOCKARD STEAMSHIP CORPORATION

Steamship Owners, Operators and Agents
17 Battery Place
New York 4, N. Y.

March 17, 1953

Mr. J. G. Barkan, District Comptroller U. S. Department of Commerce Maritime Administration 45 Broadway New York, N. Y:

Dear Sir:

Re: Amended Report General Order 60 Supplement 21 Contracts WSA 12933 and MCc 41728

We are enclosing herewith in sextuplicate amended report prepared as at December 31, 1952 covering the above contracts for the period May 1, 1946 to December 31, 1949. We are also enclosing herewith in sextuplicate statement taking into consideration preliminary payments, diversion charges and overage and shortage expendible inventory indicating a net balance due you of \$68,459.36. Our check No. 48941 to the order of the Treasurer of the United States (Maritime) is enclosed herewith for \$68,459.36.

This remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN Comptroller

EMS:bw enc.

STOCKARD STEAMSHIP CORPORATION

U. S. Department of Commerce—Maritime Administration 45 Broadway, New York, N. Y.

Contracts Nos. WSA 12933 and MCc 41728

Settlement of Additional Charter Hire under above contracts period May 1, 1946 to December 31, 1949 per General Order 60, Supplement 21, Report amended to December 31, 1952:

(Contract	203-46	418,280.66
•	44	303-46	157,923.84
	44	303-47	1,288,359.37
•	· · ·	FTA-47	51,149.61
		FTA-48	248,144.07
	**	FTA-49	224,190.66

421,426.50

Payment on Account per preliminary reports rendered:

Contract 203-46.

Continue and arriver		
203-46	156,254.86	
303-47	1,112,447.99	
" FTA-47	35,448.54	
" FTA-48	292,166.67	
" FTA—49	120,460.46	
Payment made 2/28/51 Ck # 34608	2,138,205.02 122,285.99	2,388,048.21
Diversion Charges as per Public Vouchers		
audited by Maritime Administration	36,975.99	.*0
Balance Overage & Shortage Expendible		*
Inventories used in calculation of Addi-	-	
tional Charter Hire in Amended General		
Order 60, Supplement 21 Report Sub-		
' ject to Audit per attached schedule.	22,121.85	

Remittance	herewith	 2,319,588.85 68,459.36	2,388,048.21
-		2,388,048.21	2,388,048.21

[March 17, 1953]

Mr. J. G. Barkan, DISTRICT COMPTROLLER
U. S. Department of Commerce
Maritime Administration
45 Broadway
New York, N. Y.

Dear Sir .

Re: Amended Report General Order 60 Supplement 21—Contracts WSA-12933 and MCc 41728

We refer to our letter to you of March 17 wherein we submitted amended additional charter hire report prepared under the above contracts as at December 31, 1952 covering the period May 1, 1946 to December 31, 1949. With the submission of this report we forwarded you our check No. 48941 to the order of the Treasurer of the United States (Maritime) amounting to \$68,459.36 which took into consideration balance of overage and shortage expendible inventories subject to audit by your organization amounting to \$22,121.55 in our fayor. Since rendering this report, the overage and shortage expendible inventories have been audited by your organization and certificates signed and accepted by both parties to the agreement.

We have now received three (3) invoices from your Washington office covering shortages indicated by the audit of the inventories, and in this connection we now enclose herewith statement showing adjusted additional charter hire due us after giving effect to the corrected inventory figure of \$1,372.75. This statement also takes into consideration the total inventory shortage together with another inventory adjustment, the SS. Arunah S. Abell, amounting to \$432.00 making a net balance due you of \$8,018.01 for which we enclose our check No. 50065 payable to the order of the Treasurer of the United

63 States (Maritime). We also enclose herewith in sextuplicate adjusted charter hire statement which will substantiate the amended figures shown in our settlement statement also enclosed herewith.

Copies of your Washington invoices, as follows, are also enclosed in order to enable you to properly credit our account in settlement:

1.	June	5,	1953-	Invoice	No.	312-236	\$2,202.39
2.	June	16,	1953-	46	66	312-260	4,118.87
			1953-	- 66	4.6	312-261	2,637.50

This remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

STO RD STEAMSHIP CORPORATION

E. M. SLOMAN Comptroller

EMS:bw

U. S. Department of Commerce—Maritime Administration 45 Broadway, New York, N. Y.

Contracts Nos. WSA-12933 and MCc 41728

Contracts Nos. WSA-12933	and MCc	41728			
Settlement of Additional Charter Hire und	ler above	con-			
tracts periods May 1, 1946 to December	31 1040	nor			
General Order 60 Supplement 21 Rep	ort none	per	**		
General Order 60 Supplement 21 Rep	port reno	area			
3/17/53 adjusted to include approved	1 Expen	arbie			-
Delivery and Redelivery Inventories	per atta	chèd	* *		
statement:					
Contract 203—46			416,93	58.52	.1
303—46			156,47	71.15	,
303-47			1,274,13		
FTA-47			50,48		
TIM 40			244,40		
FTA-48			244,40	00.41	
FTA-49			222,08	50.29	
Payments on Account per preliminary					×
reports rendered:				-	
Contract 203-46	421,4	26.50			
303-46	156,2		1		0
303—47	1,112,4		0 -	9 .	
TOTA 47		18.54			
FTA-47	292,1				
• FTA-48					
FTA-49	120,4	60.46			
	•				
	2,138,2	05.02	2,364,5	53.61	
Payment made 2/28/51 check #34608	122,2	85.99			
Diversion charges as per Public Vouch-					
ers Andited by Maritime Admin	36.9	75.99	-		
Description of 2/17/52 shock #48041		59.36			
Payment made 3/17/53 check #48941	. 00,4	33.30			
	0.005.0	20.00	0.004 5	20.01	
	2,365,9	20.36	2,364,5		
Refund Additional Charter Hire due us.			1,3	72.75	
	2,365,9	26.36	2,365,93	26.36	
Additional Charter Hire due as above	1.3	72.75			
Overage & Shortage Inventory Certifi-					
cates U. S. Dept. of Commerce In-					
		3.		*	
voices:				× .	
6/ 5/53-MV BECKET HITCH Inv.	4		0.00	0000	
#312-236				02.39	
6/16/53-Various Inv. #312,261				37.50	
6/16/53—Various #312-260			· 4,1	18.87	
Adjustment opening Inventory SS. Aru-	160				
nah S. Abell	•		43	32.00	
mure D. 22000g					
	. 19	72.75	0.30	90.76	
D.1		18.01	.0,0	0.10	
Balance due	8,0	10.01		4	
		00.50		00 70	
in the second second	9,3	90.76	9,3	90.76	
		mirror and the same of the sam	-	-	

Exhibit 4

MARITIME'S NOTICE OF THE COMPLETION OF FINAL AUDIT

45 Broadway New York 6, New York

QM217/L25-6-2:43002(EAB)

July 15, 1955

STOCKARD STEAMSHIP CORPORATION

17 Battery Place

New York 4, New York

Attention: Mr. E. M. Sloman, Comptroller

Gentlemen:

Subject: Accountings (as amended to December 31, 1953) Submitted Pursuant to General Order 60. Supplement 21 Covering Operations WARSHIPDEMISEOUT Contract Under 203 WSA-12933, Shipsalesdemise 303 Contract. MCc-41728 and the Foreign Trade Addendum to Contract MCc-41728 For the Period May 1, 1946 to December 31, 1949

With reference to the subject accountings, our revised report dated June 25, 1954, as supplemented May 20, 1955. (Copy No. 1 attached) incorporating our adjustments to the amended accountings submitted by you, has been approved. Appropriate provision has been made for possible subsequent adjustment.

It has been determined that there is due to the Maritime Administration from operations under the subject agreements during the period cited, additional charter hire in the total amount of \$2,428,516.42, less any amounts that have heretofore been paid on account thereof or otherwise officially credited.

As the result of this office's audit of your accountings, and the review thereof, additional charter hire has been adjusted as shown in the following summary:

	Charter Hire's as Reported in Your Accountings as Amended to 12/31/55	Maritime Administration Adjustments	"Additional Charter Hire" as Adjusted
203-5/1/46 to 12/31/46	\$ 416,528.47	\$ 2,896.48	\$ 419,424.95
303-D/C-9/1/46 to 12/31/46	155,628.82	10,330.75	165,959.57
303-D/C-1/1/47 to 12/31/47	1.270,481.33	33,344.39	1,303,825.72
303—FTA—9/1/47 to 12/31/47	50,068.61	(697.19)	49,371.42
303-D/C-1/1/48 to 3/31/48	-0-	-0-	-0-
303—FTA—1/1/48 to 12/31/48	242,039.27	11,367.88	253,307.15
303—FTA—1/1/49 to 12/31/49	230,674.29	5,953.32	236,627.61
	\$2,365,420:79	\$63,095.63	\$2,428,516.42
			1.

Inasmuch as the record of amounts paid by you on account of additional charter hire accrued under the subject contracts is maintained in our Washington office, that office, upon being furnished with a copy of our Report of Audit dated June 25, 1954, as supplemented May 20, 1955, will invoice you for any balance of additional charter hire determined to be due.

Your revised claim, in the total amount of \$102,049.00, for post-redelivery overhead expense in connection with operations under the captioned agreements submitted with your letter dated May 3, 1955, pursuant to an agreement reached at a settlement conference here on April 25, 1955, has been reviewed by me and it has been decided that the sum of \$80,179.17, plus \$13,000.00 to cover the cost of pricing of expendable inventory difference represents, in my opinion, a fair and reasonable allowance for post-redelivery overhead expense in this instance. Therefore, the revised results from operations under the respective bareboat charter contracts, as reflected in the attached Report of Audit, include post-redelivery overhead expense in the total amount of \$93,170.17.

The results, as adjusted by this office, from bareboat charter operations under the captioned agreements, are subject to possible further revision in order to take into account (a) applicable adjustments to revenue and expense recorded subsequent to December 31, 1953 and (b) any errors or omissions later noted or developed.

It is requested that you sign and return the attached duplicate of this letter, within fifteen (15) days, as acknowledgment of the receipt of your copy of our report dated June 25, 1954, as supplemented May 20, 1955, and as evidence of your concurrence in our adjustments to your amended accountings. Unless the signed duplicate copy will have been returned within the allotted fifteen (15) days, we shall consider the accountings as revised to have been accepted by you and we shall proceed accordingly.

Very truly yours,

(Original Signed) J. G. BARKAN, District Comptroller.

> J. G. BARKAN, District Comptroller.

Attachment

68

45 Broadway New York 6, New York

QM217/L25-6-2:43002(EAB)

July 15, 1955

STOCKARD STEAMSHIP CORPORATION

17 Battery Place

New York 4, New York

Attention: Mr. E. M. Sloman, Comptroller

Gentlemen:

Subject:

Accountings (as amended to December 31, 1953) Submitted Pursuant to Supplement 21 to General Order 60 covering operations under Shipsaledemise 303 (MSTS) Contract MCc-62623 and Shipsalesdemise 303 (ECA) Contract MCc-62752 For the Period August 1, 1950 to February 29, 1952.

With reference to the subject accountings, our revised report dated September 17, 1954, as supplemented May 20, 1955 (Copy No. 1 attached) incorporating our adjustments to the amended accountings submitted by you, has been approved. Appropriated provision has been made for possible subsequent adjustment.

It has been determined that there is due to the Maritime Administration from operations under the captioned agreements during the period cited, additional charter hire in the total amount of \$121,005.37, less any amounts that have heretofore been paid on account thereof.

As the result of this office's audit of your accountings, and the review thereof, additional charter hire has been

adjusted as shown in the following summary:

69	"Additional Charter Hire" as Reported in your Access.	Maritime Administration Adjustments	"Additional Charter Hire" as Adjusted
303 (MSTS) 8/1/50 to 12/31/50 303 (MSTS) 1/1/51 to 12/31/51	\$ 3,608.02 55,888.33	\$ 986.78 16,751.21	\$ 4,594.80 72,639.54
303 (ECA) 1/1/51 to 3/31/51 303 (MSTS) 1/1/52 to 2/29/52	17,225.19	26,545.84	43,771.03
	\$76,721.54	\$44,283.83	\$121,005.37

With your letter dated November 1, 1951, you submitted public voucher No. 634 for \$15,686.78 representing elaim. for refund of additional charter hire for the period August 1, 1950 to December 31, 1950. Under date of June 30, 1952, vou submitted public voucher No. 644 for \$16,048.82, which voucher superseded voucher for \$15,686.78 and represented claim for refund of additional charter hire for the extended period August 1, 1950 to December 31, 1951. Subsequently, on May 11, 1954, you submitted revised accountings for the over-all period August 1, 1950 to February 29, 1952 which reflected total additional charter hire accrued to the Administration of \$76,721.54, of which, your accountings indicate \$49,178.37 had been paid on account, leaving a balance due the Administration of \$27,543.17. In view of this indicated indebtedness and the further increase in additional charter hire as reflected in our attached report dated September 17, 1954, as supplemented May 20, 1955, your public vouchers Nos. 634 and 644, for \$15,686.78 and \$16,048.82, are herewith returned for cancellation.

Since the record of payments by you on account of additional charter hire is maintained in our Washington office, that office, upon being furnished by this office with copies of the subject accountings and our report of audit dated Sep-

temper 17, 1954, as supplemented May 20, 1955, will invoice you for any balance of additional charter hire determined to be due.

The various adjustments made by this office to your accountings have been reviewed with Mr. J. O. Wroldsen,

Treasurer, and Mr. E. M. Sloman, Comptroller. At a settlement conference at this office on April 28, 1955,

your representatives orally expressed objections to certain of our adjustments. It was agreed you could, if you desired, formalize your exceptions in writing after receiving a typed copy of our audit report. It was further agreed that our reports would not be finalized until there had been received from you a revised statement of post delivery overhead expense. Your revised claim for such expense, totaling \$19,914.63, was received with your letter dated May 3, 1955. After review by me, it was decided that \$9,382.66 represented a fair and reasonable allowance for post-redelivery overhead expense with respect to the subject agreements and this latter amount has been included in the revised results reflected in the attached report.

The results, as adjusted by this office, from bareboat charter operations under the captioned agreements are subject to possible further revision in order to take into account (a) applicable adjustments to vessel revenue and vessel expense recorded subsequent to December 31, 1953, and (b) any errors or omissions later noted or developed.

It is requested that you sign and return the attached duplicate of this letter, within fifteen (15) days, as acknowledgment of the receipt of your copy of our report dated September 17, 1954, as supplemented May 20, 1955, and as evidence of your concurrence in our adjustments to your amended accountings. Unless the signed duplicate copy will have been returned within the allotted fifteen (15) days, we shall consider the accountings as revised to have been accepted by you and we shall proceed accordingly.

Very truly yours,

(Original Signed) J. G. BARKAN, District Comptroller.

Attachments EAB/rj

1

J. G. BARKAN, District Comptroller. IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

A. 183-356

AMERICAN FOREIGN STEAMSHIP CORPORATION, Libelant,

UNITED STATES OF AMERICA, Respondent.

Notice of Hearing-Filed September 27. 1955

SIRS:

PLEASE TAKE NOTICE that respondent's exception to the amended libel herein will be brought on for hearing at a Stated Term for Motions of this Court to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, Cit, of New York, on the 13th day of October, 1955, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Dated: New York, N. Y. September 27, 1955.

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for/Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: ARTHUR M. BECKER, ESQ.
MESSRS. FOLEY & STATT
Proctors for Libelant
80 Broad Street
New York 4, N. Y.

Opinion and Order of Palmieri, D. J.—May 11, 1956 Memorandum

PALMIERI, D. J.

These libels present substantially similar questions. They have been brought to recover alleged overpayment of charter hire made to the Maritime Commission. The termination of the charters and the redelivery of the vessels in question by the libelants to the Maritime Commission took place in all cases more than two years before the suits were brought. The United States has filed exceptions to the libels as well as exceptive allegations on the ground that the suits are barred by lapse of time since they were not commenced within two years after the causes of action arose pursuant to Section 5 of the Suits in Ad-

miralty Act, 46 U.S.C. 745.

The issues presented here are substantially the same as those which were decided adversely to the libelants by the Court of Appeals for this circuit in two recent cases. Sword Line, Inc. v. United States, Ct. of App., 2d Cir., Docket #23723, February 24, 1956, also, 230 F. 2d 75 (2d Cir. 1956), 228 F. 2d 344 (2d Cir. 1955); American Eastern Corp. v. United States, Ct. of App., 2d Cir., Docket #23921, April 19, 1956, affirming, 133 F. Supp. 11 (S.D.N.Y. 1955). The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities,

of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests. See Union Pacific R. R. v. Board of County Commers, 98 U.S. 541 (1879); Cunard Steamship Co. v. Elting, 97 F. 2d 373 (2d Cir. 1938). Therefore, even though the dates of the libelants' alleged overpayments are not stated in their libels, it is clear that those for which recovery can be maintained must have antedated the redelivery dates, as subsequent payments are not recoverable. And since all of the rede-

livery dates here were more than two years prior to the suits in question, any suits for payments made prior to these redelivery dates are barred by the statute indicated.

After the argument of the respondent's motions in support of the exceptions, the libelants in all the cases except American-Foreign Steamship Corporation v. United States moved for leave to amend the libels in substantially three respects so as to allege: First, that pursuant to an agreement with the respondent all payments were tentative and subject to a final adjustment by audit; second, that the funds paid were "trust funds" held by the respondent as such for subsequent refund pursuant to an eventual audit by the Martime Commission; and third, that within two years last past refunds by the respondent became due and payable to the libelants. Clearly, the last proposed amendment is nothing more than a legal conclusion and need not be considered. In point of fact, however, this amendment as well as the other two proposed amendments were, in effect, urged in the American Eastern Corp. v. United States case, supra, and were there rejected and held to have failed to impart any validity to the libels. It happens that the counsel for all the libelants here, except American-Foreign Steamship Corporation, were also counsel for American Eastern Corp. in the District Court and

in the Court of Appeals. I have compared the amendments urged there and here and they are substantially the same. The only material difference between the proposed amendments which libelants seek to incorporate in the respective libels now before this Court, and the proposed amended libel in American Eastern Corp. v. United States, supra, is that the libelants now propose the following additional allegations:

made by libelant were deposited as 'unearned moneys' in a trust account and there retained to be refunded after completion of audit. Within two years last past,

if The actual redelivery dates are set forth in the libels in the American-Foreign Steamship Corporation and Luckenbach Steamship Company cases; in the remaining cases they are set forth in the Government's exceptive allegations. Their accuracy has not been disputed.

refunds by respondent became due and payable to libelant pursuant to such agreement."

But the "trust account" argument was urged by counsel for the liberants when they represented American Eastern Corp. before the Court of Appeals and it was clearly rejected by the Court. This point was urged after the argument before the Court of Appeals by letter addressed to the Clerk of that Court and which the Clerk was requested to bring to the attention of the Court. A reply to this letter was submitted to the Court thereafter by the United States on April 10, 1956.

Counsel for the libelants suggested upon the argument that perhaps this point has not been treated with the same degree of thoroughness as might have been the case if the point had been raised in the briefs and argued when the appeal was submitted. I cannot agree. Moreover, I consider the decision of the Court of Appeals in

this matter to be binding authority upon me.

Counsel for the libelants suggested upon the argument that perhaps a decision on these motions might be held in abeyance pending possible decisions by the Supreme Court in the American Eastern and Sword Line cases, supra, or in Smith-Johnson Steamship Corp. v. United States, de-

cided by the U.S. Court of Claims March 6, 1956, involving substantially the same issues. In view of the clear and unequivocal position taken by the Court of Appeals in this matter, I can see no valid basis for post-

poning my decision.

Accordingly, the motions for leave to amend the libels are denied. The exceptive allegations, and the exceptions in the American-Foreign Steamship Corporation and Luckenbach Steamship Company cases, are sustained. The cross-motion by American Foreign Steamship Corporation to dismiss its own amended libel for lack of jurisdiction of the district court over the subject matter is denied on the authority of the American Eastern and Sword Line cases, supra.

Settle orders on notice.

Dated: May 11, 1956.

EDMUND L. PALMIERI U. S. D. L.

Order Dismissing Amended Libel of American-Foreign Steamship Corporation—May 21, 1956

The respondent herein having excepted to the amended libel herein and libelant having moved to dismiss the amended libel for lack of jurisdiction of the District Court over the subject matter of this suit and said exception and motion having thereafter been duly brought on for hearing

before this Court on April 3, 1956.

Now on reading and filing respondent's notice of hearing dated March 23, 1956, the amended libel herein and respondent's exception thereto, libelant's notice of motion dated March 29, 1956, the affidavit of John E. Griffith, sworn to April 2, 1956, the affidavit of Melvin Spaeth, sworn to April 2, 1956, and the affidavit of Arthur M. Becker, sworn to April 28, 1956 and after hearing Arthur M. Becker, Esq. and Foley, James & Conran, Esqs., (Arthur M. Becker, Esq., of counsel), proctors for the libel-

76 ant and Paul W. Williams, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respectent, and due deliberation having been had by the Court and the Court having filed its opinion dated May 11, 1956; it is

ORDERED that libelant's motion to dismiss the amended libel for lack of jurisdiction of this Court over the subject matter of this suit be and the same hereby is denied; and it is

FURTHER ORDERED that respondent's exception be and the same hereby is sustained; and it is

FURTHER ORDERED that the amended libel be and the same hereby is dismissed with prejudice and without leave to libelant to file a further amended libel.

Dated: New York, N. Y. May 21, 1956

> (s) EDMUND L. PALMIERI United States District Judge

77

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

A. 183-200

STOCKARD STEAMSHIP CORPORATION, Libelant,

THE UNITED STATES OF AMERICA, Respondent

Order Denying Libelant's Motion to Amend Libel. Sustaining Exceptive Allegations, and Dismissing Libel—May 21, 1956

The respondent herein having filed exceptive allegations directed to the libel herein and said exceptive allegations having been duly brought on for hearing before this Court on April 3, 1956 and libelant having thereafter moved this Court on April 24, 1956, for leave to amend the libel herein and said motion having duly come on to

be heard before this Court on May 3, 1956,

Now on reading and filing respondent's notice of hearing dated March 23, 1956, the libel herein, respondent's exceptive allegations and libelant's notice of motion dated April 24, 1956, to amend the libel herein and after hearing Zock, Petrie, Sheneman & Reid, Esqs. (J. Franklin Fort, Esq. and John Cunningham, Esq., of counsel) proctors for the libelant and Paul W. Williams, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respondent, and due deliberation having been had by the Court and the Court having filed its opinion dated May 11, 1956; it is

On motion of Paul W. Williams, United States Attor-

ney, proctor for the respondent herein,

ORDERED that libelant's motion for leave to amend the libel herein be and the same hereby is denied; and it is

78 FURTHER ORDERED that respondent's exceptive allegations be and the same hereby are sustained; and it is

FURTHER ORDERED that the libel herein be and the same hereby is dismissed with prejudice.

Dated: New York, N. Y. May 21, 1956

EDMUND L. PALMIERI United States District Judge

In Admiralty Docket No. 188-69

BLIDBERG ROTHCHILD Co., INC., 80 Broad Street, New York 4, New York

against

THE UNITED STATES OF AMERICA, in causes of contract, civil and maritime, respectfully alleges upon information and belief, as follows:

Libel of Blidberg Rothchild Co., Inc.—Filed April 13, 1956

FIRST CAUSE OF LIBEL

First: Libelant, Blidberg Rothchild Co., Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal office and place of business at 80 Broad Street, New York 4, New York.

SECOND: Now and at all times herein mentioned, respondent, the United States of America, is and was a sovereign and has consented to be sued under the provisions of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741 et seq. The respondent's actions, hereinafter referred to, were taken, successively, through its agencies, the War Shipping Administration, the United States Maritime Commission, and the Maritime Administration of the Department of Commerce, hereinafter called, respectively, WSA, the Commission, and the Administration.

Third: Libelant made application to WSA pursuant to Public Law 101, 77th Congress (55 Stat. 242, 50 U.S.C.A. App. §§ 1271 et seq.) to charter vessels on an interim basis pending initiation of the chartering program authorized by section 5 of the Merchant Ship Sales Act of 1946 (60 Stat. 43, 50 U.S.C.A. App. \$1738). The application was approved and as of June 25, 1946, libelant and respondent entered into bareboat Charter No. WSA-13104, a

copy of which will be exhibited at the trial of the case. Libelant instituted operations thereunder on July 11, 1946, when the SS U.S.O. was delivered to it under that charter.

FOURTH: At respondent's invitation, libelant made application to the Commission under the Ship Sales Act and the related regulations (46 CFR 299.31 and 299.81) to charter certain war-built vessels from respondent. The application was approved, and as of September 4, 1946, libelant and respondent entered into Contract No. MCc-41814, a copy of which will be exhibited at the trial of the case. Libelant conducted operations thereunder from October 30, 1946, when the first vessel, the SS Frederic A. Kummer, was delivered to it under that charter, until November 28, 1949, when it redelivered the last vessel, the SS OMAR E. Charman, to respondent.

FIFTH: Section 5 of the Ship Sales Act sets forth the terms on which the Commission was authorized to charter war-built vessels on a bareboat basis to citizens of the United States. Paragraph (e) of that section provides that section 709 of the Merchant Marine Act, 1936, (49 Stat. 2010, 46 U.S.C. 1199) shall be applicable to charters made under said section 5. Paragraph (a) of section 709 provides that half the charterer's cumulative net profits in excess of a 10% return on the capital necessarily employed in the business of the chartered vessels shall be paid to the respondent as "additional charter hire".

SIXTH: Provisions substantially identical to those in said section 709(a) were included in the Commission's General Order 60 of April 13, 1946, [11 F.R. 4459, 46 CFR 299.31(g)] which provisions were in effect throughout the period covered by said Contract No. MCc-41814.

SEVENTH: The said contracts were drafted by respondent.

Clause 13 of Contract No. MCc-41814 provided for a
sharing with the Commission of the profits from the
charter operations through payment to the Commission of additional charter hire at rates ranging from 50%
to as high as 90%. Libelant was required, over its protest,
to agree to the unlawful provisions of clause 13 as a condition precedent to the allocation of vessels to it under
charter.

Eighth: From time to time prior to February 21, 1950, the date of its final-accounting regulations, the Commission issued instructions and regulations covering the char-

terers' preparation and submission of preliminary accountings and payments on account of additional charter hire. The charterers were thereby directed to submit periodic financial statements covering their operations of the chartered vessels, and to make preliminary payments to the Commission of a portion of the amounts thus indicated to be due on account of additional charter hire. It was expressly provided that all accountings were tentative and preliminary as respects both libelant and respondent, and were subject, first to initial audit as submitted and thereafter to final audit by the Commission after operations under the charter were terminated and all items of income and expense were known.

NINTH: Clause 13 of the said contracts provided that such preliminary payments were subject to adjustment upon completion of final audit by respondent, and that any overpayments would be refunded to the charterer at that time. Respondent's instructions and regulations, and its correspondence and course of dealings with the charterers, including this libelant, unvaryingly confirm that this was the understanding of the parties to these charter arrangements.

TENTH: In accordance with charter clause 13 and the respondent's instructions and regulations, libelant periodically rendered tentative accountings and made preliminary payments on account of additional charter hire under

said contracts. As such accountings were cumulative and subject to adjustment from period to period, the balance of accounts between libelant and respondent was constantly changing. Libelant made preliminary payments on account of additional charter hire accruing under Contracts WSA-13104 and MCc-41814 in the net aggregate amount of \$1,037,964.

ELEVENTH: On October 19, 1951, libelant submitted to defendant a final accounting covering its operations under said contracts, which final accounting was reviewed, audited, and adjusted, first by the Administration's Atlantic Coast District Comptroller, in New York, and thereafter by its auditors in Washington, D. C. By letter of April 16, 1954, the District Comptroller notified libelant that his audit report covering said contracts had been

approved, subject, however, to further adjustment to take into account any applicable items recorded subsequent to December 31, 1951, the settlement of expendable equipment inventories, post redelivery overhead expenses (except the cost of pricing expendable equipment inventories), an adjustment in respect of certain agency fees, and the exclusion of lay-up expenses on one of the chartered vessels.

TWELFTH: In connection with its preliminary accountings, libelant over its protest and as a condition of continued use of the vessels, was required by respondent to make payments on account of additional charter hire under Contract No. MCc-41814 at rates not permitted by, and in fact contrary to, section 709 of the Merchant Marine Act, 1936, section 5 of the Ship Sales Act, and the applicable regulations. The amount thus accrued and paid was greater by approximately \$268,000 than the amount which would have accrued at the 50% rate of profit-sharing sanctioned by and lawfully applicable under the relevant statutory provisions and regulations. Although duly demanded by libelant after completion of the final audit, respondent has refused and continues to refuse to make refund of such overpayments of additional charter hire thus unlawfully exacted, notwithstanding that charter clause 13 and the respondent's regulations expressly state that all pay-

83 ments on account of additional charter hire shall be preliminary and subject to adjustment and that any overpayments will be refunded by respondent upon the completion of final audit.

THIRTEENTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$268,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FOURTEENTH: All and singular the perises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this first cause of libel in the amount of \$268,000, together with the costs of suit herein.

SECOND CAUSE OF LIBEL

Libelant respectfully alleges as its second cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

SECOND: While libelant was operating a number of vessels under said Contract No. MCc-41814, the Commission, in mid-August 1947, required all charterers, including libelant, as a condition to the continued use of Government vessels, to execute an addendum (called Foreign Trade Addendum) providing that additional charter hire with respect to voyages commenced on or after September 1, 1947, should be computed, accounted for, and paid separately from voyages commenced prior thereto.

for voyages commencing on or after September 1, 1947, was not in fact intended by the Commission as a bona fide termination of the charters in any respect, but was rather an attempt by it to prevent libelant from off-setting prospective losses on voyages commenced on or after September 1, 1947, against profits realized by it from voyages commenced during the first eight months of said year. Such purported termination was arbitrary, designed to circumvent, and contrary to the express calendar-year cumulative accounting provisions of the applicable statutes, regulations, and the charter. The action was without legal or other justification, and was therefore void.

FOURTH: As a result of the improper division of the calendar year 1947 into two accounting periods, libelant has been precluded from offsetting the loss incurred during the last 4 months of that year against the profit realized from voyages commenced during the first 8 months of that year. As a consequence, libelant's additional-charter-hire liability was greater by approximately \$48,000 than it would have been had such loss been offset against profits realized from operations during the first 8 months of 1947.

85

FIFTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$48,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant, and is unpaid. This second cause of libel is covered in its entirety by libelant's first cause of libel, and is completely eliminated if such first cause of libel is decided in favor of libelant.

Sixth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays judgment against the respondent on this second cause of libel in the amount of \$48,000, together with the costs of suit herein.

THIRD CAUSE OF LIBEL

Libelant respectfully alleges as its third cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel and Articles SECOND and THIRD of its second cause of libel hereinbefore set forth.

SECOND: In addition to the purported cut-off at September 1, 1947, the Commission thereafter purported to modify the cumulative-accounting provisions of said section 709(a) and its parallel regulation by the issuance of instructions and final-accounting regulations erroneously interpreting the proviso at the end of said section 709(a) to prohibit the carry-forward of profits resulting from operations in any one year against losses sustained in the charter operations in subsequent years. This ruling was in conflict with the clear language of the statute and the legislative intent which, in recognition of the cyclical nature of ocean transportation, providing for full cumulative accounting over the entire period of the charter operations, with a final settlement of additional charter hire (which

is in essence a profit-sharing plan) after the conclusion of such operations and the completion of the final audit of the charterers' accountings by respondent. The aforesaid proviso was inserted in section 709 merely to assure that the profits of one year in which the respondent already had shared should not be carried forward to subsequent years so as again to be shared by the respondent, and the proviso was not designed (as erroneously interpreted by the Commission) to preclude full cumulative accounting over the entire charter period.

Third: In accordance with the aforesaid ruling, the respondent required libelant, over its protest and contrary to the applicable statutes and its April 13, 1946, 86 regulation, to prepare accountings and make tentative payments of charter hire on a basis precluding libelant from offsetting profits realized in one period against losses sustained from operation of the chartered vessels in a subsequent period.

FOURTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$75,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FIFTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this third cause of libel in the amount of \$75,000, together with the costs of suit herein.

FOURTH CAUSE OF LIBEL

Libelant respectfully alleges as its fourth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

Second: By charter clauses 13 and 23, respondent's final-accounting regulations (46 CFR 299.37-4), and the applicable statutory provisions, libelant is entitled to charge as a part of the cost of conducting operations under these charters the fair and reasonable overhead expenses properly assignable or apportionable thereto. In its review of libelant's accountings, libelant has improperly, and contrary to the applicable provisions of the charter, the regulations, and the statutes, reduced libelant's reported overhead expenses by the amount of certain management fees received by libelant. The result of this action was to increase libelant's reported profit and, in turn, its ostensible additional-charter-hire liability in respect of the charter operations.

87 Third: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$29,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant, and is unpaid.

FOURTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays judgment against the respondent on this fourth cause of libel in the amount of \$29,000, together with the costs of suit herein.

FIFTH CAUSE OF LIBEL

Libelant respectfully alleges as its fifth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel, and Article SECOND of its fourth cause of libel, hereinbefore set forth.

SECOND: In making its review of libelant's accounting, respondent has refused to allow to libelant as a part of fair and reasonable overhead expenses certain overhead expenses incurred by libelant after redelivery of the char-

tered vessels. Such refusal was in contravention of the applicable provisions of the charter, the regulations, and the statutes, and served to increase libelant's ostensible additional-charter-hire liability by approximately \$10,600.

Theo: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$10,600, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FOURTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this fifth cause of libel in the amount of \$10,600, together with the costs of suit herein.

SIXTH CAUSE OF LIBEL

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Libelant respectfully alleges as its sixth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

SECOND: There were latent defects in many of the chartered vessels, which defects existed when the respective vessels were delivered to libelant. It was the obligation of respondent under the charter to reimburse libelant in full for the cost of repairing such defects.

THIRD: To keep the vessels in operation, libelant was required to incur and pay for various items of repair expense necessitated by such latent defects, such expenditures amounting to approximately \$44,000.

FOURTH: Libelant in its accounting to respondent made claim for refund in their entirety of these expenditures for repairs, but respondent, contrary to the charter and its regulations, ruled that such expenses were chargeable to

voyage accounts merely as routine operating expenses and has refused to pay for or to allow full credit for such expenditures against the additional charter-hire accruals.

FIFTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately \$44,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

SIXTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays judgment against the respondent on this sixth cause of libel in the amount of \$44,000, together with the costs of suit herein.

Wherefore libelant prays that upon service of a copy of this libel on the United States Attorney for this district, and the mailing of a copy thereof to the Attorney General of the United States, in accordance with law, respondent, the United States of America, be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court will be pleased to decree to your libelant damages as follows:

On the First Cause of Libel	\$268,000
On the Second Cause of Libel	\$ 48,000
On the Third Cause of Libel	\$ 75,000
On the Fourth Cause of Libel	\$ 29,000
On the Fifth Cause of Libel	\$ 10,600
On the Sixth Cause of Libel	\$ 44,000

together with such interest as is allowable thereon for delay in payment thereof, as well as costs, and that your libelant may have such other and further relief as in law and justice it may be entitled to receive. The amounts demanded as above set forth in the several causes of libel are subject to such adjustment and modification as audit may disclose to be required in the event certain causes of libel are sustained, which have the effect of diminishing the amount in other causes of libel, all of which will be demonstrated at the trial of this case.

Zock, Petrie, Sheneman & Reid Office and P. O. Address 52 Broadway New York 4, New York

Kominers & Fort
Office and P. O. Address
Tower Building
1401 K Street, N. W.
Washington 5, D. C.

Proctors for Libelant

90 Duly sworn to by Hilding Goranson jurat omitted in printing

91

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Ad. 188-69

BLIDBERG ROTHCHILD Co., INC., Libelant,

against

UNITED STATES OF AMERICA, Respondent.

Respondent's Exception to Libel of Blidberg Rothchild Co., Inc.—Filed August 3, 1956

SIRS:

PLEASE TAKE NOTICE that the respondent, appearing specially, hereby excepts to the libel herein on the following grounds:

- (1) The libel fails to state a cause of action within the jurisdiction of this Honorable Court.
- (2) This Honorable Court lacks jurisdiction over the subject matter of this suit and over the respondent by reason of the failure of the libelant to commence

the suit within two years after November 28, 1949, the date on which the affected causes of action arose, as required under Section 5 of the Suits in Admiralty Act of March 9, 1920, as amended, 46 U.S.C. 745.

Dated: New York, N. Y. August 3, 1956

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: Zock, Petrie,
Sheneman & Reid, Esos.
Proctors for Libelant
52 Broadway
New York 4, N. Y.

92 Kominers & Fort, Esos.
Proctors for Libelant
Tower Building
14th & K Streets, N. W.
Washington 5, D. C.

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IN UNITED STATES DISTRICT COURT

Affidavit of Sylvester E. Rothchild-September 7, 1956

STATE OF NEW YORK, COUNTY OF NEW YORK,

SYLVESTER E. ROTHCHUD, being duly sworn, deposes and says:

1. I am and since prior to June 1946 have been President of Blidberg Rothchild Co. Inc., (herein called Blidberg), a Delaware corporation with principal office at 80 Broad Street, New York 4, New York, and am familiar with the facts hereinafter set forth.

- 2. Blidberg and the United States Maritime Commission executed Contract No. WSA-13104, effective as of June 25, 1946. The first vessel, the SS USO, was delivered to Blidberg under that charter on July 11, 1946. The United States Maritime Commission and its successor, the Maritime Administration of the Department of Commerce, will be referred to herein as Maritime.
- 3. As of September 4, 1946, Blidberg and Maritime executed Contract No. MCc-41814, under which charter Blidberg continued the operations previously instituted by it under Contract No. WSA-13104. Operations were conducted under Contract No. MCc41814 from October 30, 1946, when the SS Frederic A. Kummer, was delivered to Blidberg under that charter, until November 28, 1949, when it redelivered the last vessel, the SS Omar E. Chapman, to Maritime.
 - 4. On April 19, 1954, Blidberg received a letter from Maritime, dated April 16, 1954, notifying Blidberg that Maritime had completed its audit of Blidberg's accountings covering operations under the above-numbered contracts, subject however to further revision to take into account certain items therein specified.
 - 5. Blidberg filed its libel against the United States to recover additional charter hire overpaid under the said contracts on April 13, 1956; Southern District of New York, Docket No. A. 188-69.
 - 6. Blidberg made payments of additional charter hire under these contracts on various dates between December 30, 1946, and February 8, 1952, in the net aggregate amount of \$1,037,964.72. Maritime made two interim refunds in 1948, the last of which, in the amount of \$18,921.19, was paid to Blidberg on May 12, 1948. Blidberg's last payment on account of additional charter hire, in the amount of \$31,310.44, was transmitted to Maritime on February 8, 1952, with Blidberg's supplementary accounting also transmitted on that date.
 - 7. In addition to the payments and refunds on account of additional charter hire referred to in the next preceding paragraph, Maritime exacted further payments from Blidberg by withholding from it moneys due Blidberg under a

certain General Agency Agreement, Contract No. 0MA-50, as herein set forth in paragraphs 8 to 10, inclusive.

- 8. By letter of April 28, 1954, addressed to Maritime, Blidberg reiterated its protest as to certain matters in dispute and bearing on the calculation of additional charter hire, observing therein that "We will submit very shortly an accounting statement prepared in accordance with the proper and correct methods of accounting under the law and the contract and a request for reimbursement of over-payments heretofore required by the Maritime Administration." And on May 27, 1954, it submitted its voucher requesting refund of such overpayments in the amount of \$168,347.37. This request was refused by Maritime; see letter of November 3, 1954, from Maritime, which concludes with the statement that "we cannot accept your claim for refund and we are, therefore, returning, herewith, your voucher in the amount of \$168,347.37 for cancellation."
- 95. 9. Maritime, on the contrary, submitted vouchers to Blidberg as follows:

207-284, dated January 24, 1952 \$103,652.92 411-142, dated May 17, 1954 90,815.86

representing underpayments of additional charter hire alleged by Maritime to have accrued to it under Contracts Nos. WSA-13104 and MCc-41814 for the period of July 1, 1946 to November 30, 1949.

charter hire, Maritime instructed the Atlantic Coast District Comptroller to withhold payment of amounts otherwise due to Blidberg under the referred-to General Agency Agreement. Contract No. MA-50. Pursuant to this instruction, Maritime collected by such withholding a total of \$17,725. On August 18, 1955, however, Maritime discontinued the withholding of such GAA moneys, and delivered to Blidberg a check for \$17,725 in payment of the vouchers in respect of which it previously had withheld that sum. The correspondence exchanged by Maritime and Blidberg respecting these withholdings is annexed hereto, as follows:

Letters from Blidberg to Maritime, dated 12/28/54, 3/18/55, 4/22/55, 5/20/55, 6/22/55, and 7/13/55; and from Maritime to Blidberg, dated 8/5/54, 9/16/54; 12/15/54, 12/30/54, 1/18/55, 2/11/55, 3/22/55, 3/28/55, 4/26/55, 5/26/55, and 7/1/55.

11. By circular of May 14, 1951, addressed "To: Bareboat Charterers", (copy of which was received by Blidberg and is annexed hereto) Maritime instructed that checks submitted by charterers for additional charter hire should not contain a restrictive legend "to the effect that it is a final settlement." The circular emphasized that such remittance by the charterer is "on account" of additional charter hire, is subject to adjustment upon the completion of final

accounting between the charterer and Maritime, and that neither the tender nor acceptance of such remittance constitutes a waiver of the rights or remedies of either party "under the terms of the agreements involved

or otherwise."

12. By letter of April 28, 1954, to Maritime Comptroller, Blidberg protested the results of Maritime's final audit. Specifically it (1) reiterated its insistence that the profits payable to Maritime should not be computed at rates in excess of the 50% specified in the statute; (2) protested the refusal to permit cumulative accounting over the entire period of the charter; (3) protested the accounting cut-off at September 1, 1947. Conformably with this protest, Blidberg submitted a voucher on May 27, 1954, requesting Maritime to refunds \$168,347.37 theretofore overpaid on account of additional chalter hire. Maritime asserted, on the contrary, that Blidberg was underpaid in respect of additional charter hire, and was still indebted to Maritime on that account in the sum of \$194,468.76; by letter of December 15, 1954, Maritime demanded payment by Blidberg of this amount, in default of which a Government-wide set-off payment order would be issued. Blidberg referred to the disputes then pending in connection with its final accountings, and requested that issuance of the set-off payment order be held in abeyance pending the outcome of the discussions of those disputes. To this request, Maritime replied, on December 30, 1954:

"This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreements are binding upon your Company to pay such amounts as were billed to you with the understanding that refunds will be made of any amounts determined through supplementary 63

accountings, to have been overpaid.

"Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

"Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954."

Various letters bearing on this matter are annexed to this affidavit, as follows: Letters from Blidberg to Maritime, dated 4/28/54, 5/27/54, and 12/28/54; and letters from Maritime to Blidberg, dated 8/5/54, 9/16/54, 11/3/54, 12/15/54, and 12/30/54.

13. Blidberg's contention that additional charter hire should be computed at the 50 percent rate provided by statute instead of the sliding scale set forth in charter clause 13, involves \$267,164.79; the dispute concerning the accounting cut-off at September 1, 1947, involves \$48,613.20; and the contention that the results of Blidberg's operations should be accounted for on a cumulative basis over the entire period of the charter involves \$74,433.85. The maximum involved if all three of these disputes are decided in favor of Blidberg is \$267,664.78.

/s/ Sylvester E. Rothchild.

Subscribed and sworn to before me this 7th day of September, 1956.

/s/ CHARLES L. FEIBER, Notary Public.

My commission expires 3/30/58.

CIRCULAR LETTER FROM MARITIME, MAY 14, 1951

U. S. DEPARTMENT OF COMMERCE
Maritime Administration
Office of the District Comptroller
45 Broadway
New York 6, New York

May 14, 1951

To: Bareboat Charterers (No. 203 and/or No. 303 Agreements)

Subject: Remittances Account of Additional Charter Hire Submitted with Accountings Required Pursuant to Supplement 21 to General Order 60

With respect to the subject matter, it has been noted that in some instances the voucher portion of the check includes language to the effect that the remittance is the final settlement. Furthermore, in some instances voucher checks and non-voucher checks have been used on the reverse side of which (above the space provided for endorsement) appears a printed legend equally as restrictive. Obviously such remittances cannot be accepted on that basis.

Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount

thereof, nor as a waiver of the rights or remedies of 99 either party under the terms of the agreements involved or otherwise. The letter should be signed by an authorized officer of the Charterer.

Where a non-voucher check contains a restrictive legend, the Charterer should delete the restrictive legend and submit a letter of transmittal incorporating language such as is outlined above, said letter to be signed by an authorized officer of the Charterer.

Kindly give this matter preferred attention.

J. F. Keating District Comptroller

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Attachment to Affidavit

Exhibit 6

Correspondence Showing Maritime's Recognition That Overpayments Were to be Refunded Upon Final Audit and That All Rights Were Reserved by Clause 13

> BLIDBERG ROTHCHILD Co. INC. Ship Operators and Agents 80 Broad Street New York 4, N. Y.

> > April 28, 1954

By HAND

YOUR REF: QM35/L25-6-2:43002 (BAM)
Mr. J. G. Barkan, District Comptroller,
Maritime Administration,
U. S. Department of Commerce,
45 Broadway,
New York 6, New York.

Subject: Accounting Under Bareboat Charter Agreement Shipsalesdemise 303 Contract MCc-41814 and the Foreign Trade Addendum thereto, for the period January 1, 1947 to November 30, 1949

Supplementary Accounting Under Bareboat Charter Agreements Warshipdemiseout 203 Contract WSA-13104 and Shipsalesdemise 303 Contract MCc-41814 for the Period July 1, 1946 to December 31, 1946

Dear Sir:

Reference is made to your letter of April 16, 1954, received April 19, 1954, concerning the above accountings.

This letter is to advise you that we do not concur in the unilateral adjustments which your auditors have made 101 in our accountings nor do we accept the accountings as adjusted further. We are returning herewith the duplicate copy of your letter unsigned so that there may be no misunderstanding as to our position.

We repeat and reiterate our prior protest with respect to the accounting theories and rulings heretofore followed by your auditors, and particular protest is made with respect to the following points:

- 1. The requirement that additional charter hire be paid in excess of the amounts permitted under the law, i.e., all amounts in excess of 50 percent of the profits after an allowance for 10 percent of capital necessarily employed.
- 2. The refusal to permit cumulative accounting for the entire period of operation under the bareboat charters.
- 3. The requirement that separate accountings be made of additional charter hire for the period before and after September 1, 1947.
- 4. The failure to make reimbursement to Blidberg Rothchild Co. Inc., for various repairs, including those caused by latent defects which are for the account of the Maritime Administration.
- 5. The formula used in the definitions with respect to computing capital necessarily employed and net voyage profit.
- 6. The arbitrary limitations of allowable post-redelivery overhead.
- 7. The disallowance from income from other operations of the profit portion of fees earned from managing ships owned by others.

It is our contention that the position taken by the Maritime Administration with respect to each of the 102 above items and other problems not here listed is erroneous either under the bareboat charter contract or the applicable provisions of the Merchant Ship Sales Act, 1946, and the Merchant Marine Act, 1936. For that reason, we cannot accept your determinations with respect to these disputes nor the adjustments mentioned in your letter of April 16, 1954.

We will submit very shortly an accounting statement prepared in accordance with the proper and correct methods of accounting under the law and the contract and a request for reimbursement of overpayments heretofore required by the Maritime Administration.

Very truly yours,

BLIDBERG ROTHSCHILD CO. INC.

By:

President.

SER:UA Encl.

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Attachment to Affidavit

Exhibit 6

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to Maritime Administration and Refer to File No.

QM35/L10-5-2:453

December 30, 1954

Blidberg Rothchild Company, Inc., 80 Broad Street, New York 4, New York

Gentlemen:

Subject: Invoice 207-284 \$103,652.90 (Balance)
Dated January 24, 1952
Invoice 411-142—\$ 90,815.86
Dated May 17, 1954

Reference is made to our letter of December 15 and your reply of December 28, 1954, relative to the payment

of the subject invoices for additional charter hire due in accordance with provisions of Clause 13 of the Charter Contracts.

This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreement are binding upon your Company to pay such amounts as were billed to you with the understanding that refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.

Accordingly, it is suggested that you remit the amounts' presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously

amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954.

Very truly yours,

Sgd/ A. R. Boone Acting Comptroller

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IN UNITED STATES DISTRICT COURT

Supplemental Affidavit of Sylvester E. Rothchild— September 10, 1956

STATE OF NEW YORK, SS.

SYLVESTER E. ROTHCHILD, being duly sworn, deposes and says:

- 1. This supplements my affidavit of September 7, 1956.
- 2. Under Bareboat Charters Nos. WSA-13104 and MCc-41814, Blidberg Rothchild Co. Inc. made payments on account of additional charter here to the United States

Maritime Commission and to the Maritime Administration of the Department of Commerce, herein called Maritime, and Maritime made refunds to Blidberg Rothchild Co. Inc. on that account, as follows:

Date	Payment	Refund
December 30, 1946	\$157,591.45	
February 27, 1947	the second second	L. LA
February 28, 1947		
February 28, 1947	The second second second	400
April 1, 1947		11.00
May 17, 1947	. / = = 00 0=	
May 14, 1948	01 000 10	
April 1, 1947	44 007 40	
May 6, 1947	. 00100	
June 6, 1947	00 700 00	
July 3, 1947	044 700 04	
August 1, 1947		
September 9, 1947		
October 3, 1947		
November 7, 1947		.0
February, 1948		\$46,548.71
May 12, 1948		18,921.19
June 3, 1949		10,021.10

106 Supplemental Affidavit of Sylvester E. Rothchild

Date a	Payment	Refund
July 1, 1949	\$ 4,233,47	
August 4, 1949	18,077.44	
September 7, 1949		Service of
October 12, 1949		
March 28, 1950		
October 19, 1951	40,368.34	
October 19, 1951		
February 8, 1952		10
March 18, 1955		11/1
April 22, 1955		
May 20, 1955		1.
June 22, 1955		/ .
July 13, 1955		/
August 18, 1955		\$17,725.00

3. The five payments made in 1955 were exacted by Maritime through the device of withholding amounts due to Blidberg Rothchild Co. Inc. under a General Agency Agreement, No. MA-50. On August 18, 1955, however, these amounts (totaling \$17,725.00) were refunded by Maritime; on that date it discontinued the exaction of such payments by withholding from General Agency moneys, and delivered to Blidberg Rothchild Co. Inc. a check for the entire \$17,725 theretofore withheld.

SYLVESTER E. ROTHCHILD.

Subscribed and sworn to before me this 10th day of September, 1956.

CHARLES L. FEIBER Notary Public

My commission expires March 30, 1958

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IN UNITED STATES DISTRICT COURT

Affidavit of H. M. Hermanson

STATE OF WASHINGTON COUNTY OF KING 88.:

- H. M. HERMANSON, being duly sworn, deposes and says:
- 1. I am the Assistant Auditor of James Griffiths & Sons, Inc. with offices at 914 Second Avenue, Seattle 4, Washington, and am familiar with the facts hereinafter set forth.
- 2. James Griffiths & Sons, Inc. entered into bareboat charter agreements with the War Shipping Administration, contract No. WSA-13203, and with the Maritime Administration, contract No. MCc-41865.
- 3. In connection with the accountings of profits as additional charter hire under these contracts, a dispute arose between the Maritime Administration and James Griffiths & Sons, Inc. concerning the proper construction of certain War Shipping Administration regulations relating to adjustment of liquidation compensation.
- 4. Annexed hereto are (a) a true copy of a letter dated July 7, 1955 sent by James Griffiths & Sons, Inc. to the Mari-

time Administration, and (b) true copies of letters dated July 9, 1954, May 19, 1955 and July 15, 1955, received by James Griffiths & Sons, Inc. from the Maritime Administration.

H. M. HERMANSON. H. M. HERMANSON.

Sworn to before me this 6th day of September, 1956. WILLIAM CHRISTOFFERSEN

Notary Public.

(SEAL)

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IN UNITED STATES DISTRICT COURT

Attachment to Affidavit

Exhibit 7

Letter Showing Maritime's Recognition of the Long Time Necessary to Assemble Accounts

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to Maritime Administration and Refer to File No.

QM92/L25-6-2:431(HM)

Jul 9 1954

JAMES GRIFFITHS & SONS, INC. 914 Second Avenue Seattle 4, Washington

Gentlemen:

Subject: Supplemental Accountings Under Warshippemiseout 203, Shipsalesdemise 303 and Foreign Trade Addendum for the Period August 1, 1946 to October 31, 1948

With respect to the subject accountings, you are advised that the report dated December 11, 1953, as adjusted, (copy attached) has been approved, and it has been determined that additional charter hire amounting to \$338,778.82 has accrued to the Maritime Administration as a result of your operations under the subject bareboat charter agree-

ments, less any amounts that have heretofore been paid on account thereof.

We have given consideration to the protest contained in your letter dated October 5, 1953 wherein you objected to the adjustment of the Administration's auditor with respect to the WSA liquidation fees. It is your contention that by the act of redelivery of each vessel to the Govern-

ment, your company was entitled to receive a definite 109 sum of money, not contingent upon future services, and you included the entire liquidation compensation as income at the time of redelivery of each vessel.

The plain language of Section 306.202 of W.S.A. General' Order, 56, together with the record preceding the adoption of that Order, requires that we reject your contention. In this connection, for convenience of reference, the introductory language of the cited section reads as follows:

"Section 306.202 Compensation to General Agents, Agents, and Berth Agents for liquidating the business of vessels. (a) in addition to the compensation otherwise provided in Sections 306.171 to 306.205, inclusive, General Agents, Agents, and Berth Agents shall be paid for liquidating the business of vessels assigned to them under a standard form of service agreement, GAA, TCA, BA:"

For your information in this connection, in the memorandum of January 31, 1948 from the Assistant Deputy Administrator for Ship Operations to the Administrator of the War Shipping Administration, recommending the adoption of General Order 56, it, was stated, among other things, that upon the redelivery of a vessel to the War Shipping Administration, or the constructive or actual. total loss of a vessel, the final compensation provided in General Order 34 terminated; that, pursuant to Section 306.98(b) (2) thereof, the Administrator was required to determine fair and reasonable compensation for services in liquidating the accounts and business of the vessel rendered subsequent to such redelivery or loss: that it was agreed-that the work of liquidation due to failure of foreign subagents to clear accounts and for other reasons would average eighteen months after the date the vessel was redelivered or lost; and that, as the agents had been prevented by recapture proceedings and taxation from

accumulating a reserve from compensation received during the term of operation under agency agreements to carry them over the liquidation period, it

proposed to pay the additional compensation provided in the Order as adopted. We feel that the language in General Order 56 and the record preceding its adoption is so crystal-clear on this point that there can be no question. that such liquidation compensation was intended to cover services required after redelivery or loss of the vessels.

The attached revised accounting is subject to further adjustment to take into account (a) any applicable items recorded subsequent to June 30, 1953 and (b) any errors

or omissions later-developed.

Very truly yours.

B. W. HARVEY Chief. Division of Audits

Enclosure

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Attachment to Affidavit

Exhibit 6

U. S. DEPARTMENT OF COMMERCI MARITIME ADMINISTRATION WASHINGTON 25, D. C.

Address Reply to Maritime Administration and Refer to File No.

QM92/L10-5-2:453

July 15, 1955

JAMES GRIFFITHS & SONS, INC. 914 Second Avenue Seattle 4, Washington .

Attention: Mr. J. D. McMasters, Secretary

Gentlemen:

Subject: Invoice 108-171-\$6,169.29 (Balance)

Dated February 9, 1951

Reference is made to the subject invoice, to our letter . of May 19, 1955, and to your reply of July 7, 1955, concerning additional charter hire due the United States pursuant to the provisions of Clause 13, Part II of Warshippemiscout 203 Contract WSA-13203 and Shipsalesdemise 303 Contract MCc-41865, which provisions were quoted in our letter of May 19, 1955.

In your letter of July 7, 1955, you state that you had taken exception to the adjustment of the Administration's Auditor with respect to W. S. A. liquidation fees; you further state that you understand that other steamship companies have taken the same position in this matter and, you have been advised that a similar case is being or will shortly be argued in the Courts, therefore, you are unable to comply with our request for an early settlement of this invoice.

From the provisions of Clause 13 quoted in our letter of
May 19, 1955, it is evident that situations such as
112 you point out in your letter were anticipated at the
time of entering into the contracts, and in view
thereof, provisions were placed in the contracts which
would require the charterer to pay additional charter hire
to the government on a preliminary basis with a further
provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.

In regard to the last paragraph of your letter, this office would not consider it proper to defer collection action because of pending litigation, especially since such litigation is not in connection with this specific case, but would prefer to handle this matter in accordance with Clause 13 of the service agreements.

Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded.

Very truly yours,

Wesley C. Clark
Wesley C. Clark
Chief, Division of Credits
and Collections

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Affidavit of C. F. Teese

STATE OF NEW YORK, COUNTY OF NEW YORK, SS.:

C. F. TEESE, being duly sworn, deposes and says:

- 1. I am the General Auditor of North Atlantic and Gulf Steamship Company with offices at 120 Wall Street, New York 5, New York, and am familiar with the facts hereinafter set forth.
 - 2. On October 21, 1954 and on December 16, 1954, the North Atlantic and Gulf Steamship Company filed separate libels in the District Court for the Southern District of New York, Nos. Ad. 183-255 and Ad. 184-37, seeking recovery from the United States of overpayments of additional charter hire for vessels bareboat chartered from the United States Maritime Commission under contracts Nos. MCc-41742, MCc-62754 and MA-42. The bases for the libels were (a) that the Maritime Commission and its successor the Maritime Administration had required the North Atlantic and Gulf Steamship Company to pay as additional charter hire a share of the company's profit in excess of the 50 percent prescribed by section 709(a) of the Merchant Marine Act, 1936, and (b) that, in violation of the cumulative accounting requirement of section 709(a) of the Merchant Marine Act, 1936, the Maritime Commission and its successor the Maritime Administration had refused to permit the North Atlantic and Gulf Steamship Company to offset losses in one year as against profits in another year in its accounting for additional charter hire.
 - 3. Notwithstanding the pendency of these two suits, the Maritime Administration demanded that the company continue to make disputed payments of additional charter hire. And when the company called attention to the pendency of the suits and to the fact that the company
 - claimed that it had already paid substantially more than was due, as additional charter hire, the Maritime Administration replied that the company would have to continue to make preliminary payments since they were required by clause 13 of the charter, which further provided that all rights were reserved to the date of final

audit at which time such refunds would be made as would be required.

4. The demands of the Maritime Administration and the statements of the position of the North Atlantic and Gulf Steamship Company are set out in letters from the Maritime Administration to the company, dated July 9, 1954, January 20, 1955, February 9, 1955 and March 8, 1955; and in letters from the North Atlantic and Gulf Steamship Company to the Maritime Administration dated July 1, 1954, January 31, 1955 and February 24, 1955, true copies of which are annexed hereto.

C. F. TEESE.

Sworn to before me this 10th day of Seprember, 1956.

WALTER KLAMMER
Notary Public, State of New York

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Attachment to Affidavit Exhibit 6

July 1st, 1954

Mr. C. W. Tacker Comptroller Maritime Administration U. S. Department of Commerce Washington 25, D. C.

Dear Sir:

Subject: Accountings under Bareboat Charter MCc41742

North Atlantic and Gulf Steamship Company, Inc., has rendered accountings and made payments on account of the operations under the above contract in accordance with the accounting requirements and regulations of the U. S. Maritime Commission and its successor, the Maritime Administration. Such accountings and payments were made notwithstanding that the regulations of the Administration were considered by us either to have been misinterpreted or to be contrary to applicable provisions of law. They were thus rendered without prejudice and with full reservation of our rights.

Protest has been heretofore made with respect to the requirement that additional charter hire in excess of 50 percent of the amounts after 10 percent of capital necessarily employed be paid, and to the refusal of the Maritime Administration to permit a cumulative accounting over the entire period of the charter. We reiterate those protests for the reason that such requirements are contrary to provisions of Section 709 of the Merchant Marine Act, 1936, which was incorporated by reference into Section 5 of the Merchant Ship Sales Act, 1946, and made applicable to all charters made pursuant to that latter statute. There are also other respects in which we consider the requirement of the Administration to be improper, and we reserve our that in all respects as to any further matters which may arise in connection with the

finalizing of the accountings under the Bareboat

We submit herewith an accounting statement prepared in accordance with the foregoing, together with our invoice covering overpayments heretofore required in the amount of \$705,426.32 and request that reimbursement in that amount be made.'

Very truly yours,

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY, INC.,

> C. F. TEESE General Auditor

Enclosures

CC: Mr. J. G. Barkan
District Comptroller
Maritime Administration
45 Broadway
New York, New York

Attachment to Affidavit

Exhibit 6

January 31st, 1955

U. S. Department of Commerce Maritime Administration Washington 25, D. C.

Attention: Mr. Wesley C. Clark, Chief

Division of Credits and Collections

Gentlemen:

Subject: Your Ref. QM 147/L10-5-- :453 Invoice 207-228-1 1/14/52 — \$ 4,650.00 (Balance) Invoice 506-242-12/17/54 — \$125,778.84

We acknowledge receipt of your letter dated January 20th, 1955 requesting payment of the above invoices. We wish to discuss in this letter your invoice for \$125,778.84 representing balance due of additional charter hire. Your invoice for \$4,650.00 will be discussed in a separate letter.

As concerns your invoice for additional charter hire, we would like to point out that the Audit Report prepared by your District Office is subject to certain accepted adjustments which considerably lessen the amount of profit indicated in their report. These adjustments are to be made the subject of a Supplemental Accounting which will be submitted in the very near future. Any request for funds should recognize these conditions.

In any event, we can not recognize your invoice as a statement of amounts due. As we have pointed out in our previous correspondence addressed to your New York Office, and as you are no doubt aware, we have filed a Libel against the U. S. Attorney claiming refund of additional charter hire. Our libel is based on what we consider to be a proper interpretation of the terms of the Agreements involved.

We therefore suggest that any further action be withheld at this time as our Supplemental referred to above is prepared. We can only agree on what would be an amount of additional charter hire as calculated under

Maritime interpretation. However, no payment can be made without final disposition of the matter referred to above.

Very truly yours,

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY, INC.,

> C. F. TEESE General Auditor

CFT:fj

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Attachment to Affidavit

Exhibit 6

U. S. DEPARTMENT OF COMMERCE MARITIME ADMINISTRATION . WASHINGTON 25, D. C.

Address Reply to MARITIME ADMINISTRATION and Refer to File No.

QM147/L10-5-2:453

Mar. 8, 1955

North Atlantic and Gulf Steamship Company Incorporated 120 Wall Street New York 5, N. Y.

Gentlemen:

Subject: Invoice 207-228- 1/14/52... \$ 4,650.00 (Balance) Invoice 506-242-12/17/54... 125,778.84

Reference is made to our letter of February 9 and your reply of February 24, 1955, relative to the payment of the subject invoices for additional Charter Hire due in accordance with the provisions of Clause 13, Part II of the Charter Contracts.

In your letter of February 24 you state as follows:

"We agree that the provisions regarding the preliminary payments of Charter Hire are quite clear, however, we feel that this question involves payment of additional Charter Hire as determined on the basis of final audit. The amount of additional Charter Hire indicated on your invoice

is the amount shown on the audit report prepared by your local district auditor, however, if you will review your files you will find that this audit report was accepted only on the basis that it was to be amended by supplemental accountings."

Once again we would like to call your attention to the last part of Clause 13 of the Agreements which states as follows:

hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which time such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

Under the terms of the Agreemnets quoted in part, above, your company is indebted to the United States for additional Charter Hire at this time.

In reference to the last paragraph of your letter calling our attention to the fact that your Company has a suit pending against the United States Government; we fail to see how this pending suit has any bearing whatsoever on the payment of the subject invoices, for amounts due this Administration pursuant to the provision of the Charter Agreements, and binding upon your company to pay.

Accordingly, it is requested that you remit the amounts presently established as being due the United States for additional Charter Hire and promptly take the necessary action to finally resolve with our District Comptroller the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the Charter Agreement.

Very truly yours,

Wesley C. Clark
Wesley C. Clark
Chief, Division of Credits
and Collections

BLIDBERG ROTHCHILD Co., INC. V. UNITED STATES OF AMERICA.

IN ADMIRALTY 188-69.

Memorandum Opinion Sustaining Exception, Dismissing Libel and Denying Motion for Leave to Amend—November 5, 1956

Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

Respondent's exception is sustained; libel is dismissed.

Libelant's application for leave to amend is denied.

The points now at issue before the Court have been too well-settled by recent authoritative decisions as to require consideration de novo Sword Line v. United States, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; American-Eastern Corp. v. United States, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58 (S. D. N. Y. 1956). The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

Settle order on notice.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Ad. 188-69.

BLIDBERG ROTHCHIED Co., INC., Libelant, against

UNITED STATES OF AMERICA, Respondent.

Order Sustaining Exception, Dismissing Libel and Denying Motion for Leave to Amend—November 15, 1956

The respondent having excepted to the libel herein and said exception having duly come on for hearing before this Court on August 14, 1956 and the libelant having thereafter moved this Court for leave to file an amended libel, and due deliberation having been had by the Court and the Court's memorandum dated November 5, 1956 having been filed on said date, it is

On motion of Paul W. Williams, United States Attorney, proctor for the respondent herein

ORDERED that the respondent's exception to the libel herein be and the same hereby is sustained and the libel be and it hereby is dismissed for lack of jurisdiction of this Court by reason of Title 46 U.S. C. 745; and it is

FURTHER ORDERED that libelant's motion for leave to file an amended libel herein be and the same hereby is denied.

Dated: New York, N. Y., November 15, 1956.

WILLIAM B. HERLANDS, United States District Judge. 123

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos, 126, 135, 214-225—October Term, 1956:

Argued January 15, 1957

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24200

STOCKARD STRAMSHIP CORPORATION, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24291

A. H. BULL STEAMSHIP Co., BULL INSULAR LINE, INC., BALTIMORE INSULAR LINE, INC., Libelants-Appellants,

UNITED STATES OF AMERICA, Respondent-Appellee.

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No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY, Libelant-Appellant,

V.

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24283

DICHMANN, WRIGHT & PUGH, INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee,

No. 24284

POLARUS STEAMSHIP Co., INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24285

A. L. BURBANK & COMPANY, LTD., Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

125 No. 24286 ·

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T. J. STEVENSON & Co., INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULE STEAMSHIP Co., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC., Libelant-Appellant,

1

UNITED STATES OF AMERICA, Respondent-Appellee. .

No. 24400

BLADBERG ROTHCHILD Co., INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

FALL RIVER NAVIGATION Co., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

Before:

MEDINA and HINCKS, Circuit Judges, and LEIBELL, District Judge.

Consolidated appeals from orders of the United States District Court for the Southern District of New York, Palmieri and Herlands, JJ., finally dismissing for lack of jurisdiction libels to recover affegedly illegal overcharges made by the Maritime Commission on its charter dealings with the libelants. Affirmed as to all appeals except the Dichmann, Wright & Pugh, Inc. appeal, which is dismissed.

J. Franklin Fort, Kominers & Fort, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), for all libelants-appellants except American-Foreign Steamship Corp.

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.

Cravath, Swaine & Moore, New York, N. Y., for New York and Cuba Mail Steamship Company.

127 Hill, Betts & Nash, New York, N. Y., for Dichmann, Wright & Pugh, Inc.

Kirlin, Campbell & Keating, New York, N. Y., for A. H. Bull Steamship Co., etc.

Lester Levin, New York, N. Y., for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.

Zock, Petrie, Sheueman & Reid, New York, N. Y., for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company (Roberts & Mc-Innis, Whington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall / River Navigation Company).

ARTHUR M. BECKER, FOLEY, JAMES & CONRAN, New York, N. Y. (Becker & Maguire, Washington, D. C., of counsel), for libelant-appellant American-Foreign Steamship Corporation.

Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., on the brief), for United States of America.

Opinion-September 25, 1957

HINCKS, Circuit Judge:

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Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act. 50 U. S. C. A. App. \$1735 et seq., and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, exacted from them too great a percentage of the profits and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. \$741 et seq., to recover the illegally collected amounts. The foregoing cause of action is asserted in each of the libels. In several of the cases some payments were made by the shippers after redelivery of the ships and within two years of the filing of the libel. And some of the libelants sought to obtain refund of certain alleged overcharges caused by the Commission's refusal to allow certain expense deductions and its refusal to permit cumulative accounting under certain circumstances.1

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the

¹ A few of the libels alleged disputes as fo the valuation of specific items entering into the cost basis upon which the profits were calculated. These included differences concerning the amount of "capital necessarily employed," the "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit. We append to this opinion a chart

showing the dates pleaded in the libels and, in some cases, in the Government's exceptive allegations. Since the dates in the exceptive allegations were not

challenged, we accept them as true.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were timebarred. Judge Herlands, in a memorandum opinion set out in the margin, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was

"November 5, 1956

MEMORANDUM

"Libelant here seeks to recover from respondent alleged overpayments made, pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

"Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

"Respondent's exception is sustained; libel dismissed. Libelant's application for leave to amend is denied.

"The points now at issue before the Court have been two well-settled by recent authoritative decisions as to require consideration de novo. Sword Line v. United States, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; American Eastern Corp. v. United States, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58 (S. D. N. Y. 1956) The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

"Settle order on notice.

WILLIAM B. HERLANDS
United States District Judge."

correct to dismiss the libels and deny amendment because

jurisdiction was lacking.

Before dealing with this question, we note that we 130 are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. \$1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. \$2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956,-more than 15 days later. The appeal therefore is too late, and must be dismissed. The Fanny D (Eggers v. Southern Steamship Co.), 5 Cir., 112 F. 2d 347, cert. den. 311 U. S. 680; Blaske v. Dick, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U.S. C. A. App. \$1735 et seq., provided for rental rates in \$1738, which incorporated by reference \$709(a) of the Merchant Marine Act. 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commis-'sion should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that \$709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters which provided a sliding scale for the additional charter hire depending on the amount of profits per day in excess of the 10% return. The libelants, as charterers,

agreed to progressive rates which allowed the Commission to recapture 90% of the profits in excess of \$300 per day, per vessel, above the 10% return, and

made payments accordingly.

However, the libelants objected to the sliding scale rate as illegal before making payment thereunder and obtained from the Maritime Commission the assurance that payments of charter hire were to be deemed preliminary and subject to adjustment until final audit. In recognition of this the Commission inserted Clause 13 in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. To support this, they point to Commission regulations, 46 CFR §\$299.31

(k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin, and to the 132 Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unaearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App.

§1745(d).

The libelants argue that the cause of action for return of charter hire illegally exacted accrued as of the date of final audit, or—at the earliest—when the last payment or credit entry in their account with the Commission was

^{3 &}quot;Clause 13. Additional Charter Hire. . .

[&]quot;The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

^{4&}quot;Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Maritime Administration shall be construed as an approval of the correctness of the amount thereoff nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (May-14, 1951 letter from Maritime.)

made. In all cases this would avoid the time bar. The Government contends that the statute commenced running as of the date when each libelant redelivered the chartered vessels to the Commission. If this be so, these libels would be time-barred.

We agree with the judges below that the basic issues in this appeal were decided adversely to the appellants in our decision in Sword Line v. United States, 2 Cir., 228 F. 2d 344, aff'd on petition for rehearing 230 F. 2d 75, aff'd as to jurisdiction 351 U. S. 976, and in American Eastern Corp. v. United States, 133 F. Supp. 11, aff'd 2 Cir., 231 F. 2d 664, cert. den. 351 U. S. 983.

The Sword Line case held that a cause of action, such as that presented in these appeals, accrues as of the redelivery date. See 228 F. 2d 344, 347; 230 F. 2d 75, 76. In so holding, the majority in that case carefully considered and explicitly rejected the argument that the effect of Charter Clause 13 was to delay the commencement of the running of the statute until final audit. This was also the holding in American Eastern, supra, 133 F. Supp. at page 15.

To avoid the impact of these decisions, the appellants have restated their theories but even as restated most of them were presented and rejected in Sword Line and 133. American Eastern. The "mutual account" or "open

account" theory as advanced by Judge L. Hand was rejected by his colleagues in the Sword Line, 228 F. 2d at 347, and by the court in American Eastern, 133 F. Supp. at page 15. Nor were the preliminary charter hire payments a "trust fund" because they were kept in a special account. This argument was forcefully brought to the court's attention in the American Eastern appeal by a letter from appellants' counsel which thoroughly discussed the point and cited the court to Rosenman v. United States, 323 U. S. 658. In its petition for rehearing in Sword Line, the appellant made essentially the same argument but, in somewhat more general terms.

There remains the contention, forcefully urged by those appellants to whom it is available, that, even if suits for refund of payments made prior to redelivery of the ships are time-barred, the court had jurisdiction over those libels which demanded refund of post-redelivery payments to the Commission which were made within two years of

the filing of the libel. (For libels so situated, see the Appendix hereto.) The Government replies that the libelants cannot now demand refund since such payments were voluntary, citing Railroad Co. v. Commissioners, 98 U. S. 541, and Cunard S.S. Co. v. Elting, 2 Cir., 97 F. 2d 373, and that, in any event, since the libelants accepted the ships on the Commission's terms, they are now estopped from disputing them, citing Commissioner of Internal Rev. v. National Lead Co., 2 Cir., 230 F. 2d 161, aff'd on other grounds 352 U. S. 313.

This point was unmistakably presented and was disposed of without discussion by another panel of this court in Sword Line in an opinion which did not explain why the court lacked jurisdiction of the claim for recovery of the post-redelivery payments. However, the rationale of the

opinion in that case which was equally applicable to 134 payments made before and after redelivery, and the rationale of American Eastern, required the orders of dismissal now before us on review. Indeed, in its briefs and its petition for rehearing in Sword Line, the libelant pointed out that after redelivery and within two years prior to the fibel it had paid to the Commission \$660,000, which it contended was additional charter hire. Yet the court held that there was no jurisdiction to entertain the claim.

Apparently the only point now pressed which was not determined in Sword Line or American Eastern was raised in the Blidberg libel. This concerned a claim for expenses incurred in repairing latent defects which existed when the ships were received by Blidberg. But this claim was obviously in existence, at the very latest, when the ships were redelivered. Since the libels were not filed within two years of the redelivery these claims are barred. 46 U. S. C. A. §745.

If the subject-matter of these appeals were res nova, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the court. On the authority of Sword Line and American Eastern we hold that these libels also were barred.

Accordingly, the decrees appealed from are affirmed except the Dichmann, Wright & Pugh, Inc. appeal which is dismissed.

24200 Stockard S.S. Corp. 24200 Stockard S.S. Corp. 24200 Stockard S.S. Corp. 24201 Stockard S.S. Corp. 24202 Stockard S.S. Corp. 24223 TDichmann, Wright & 5/13/54 9/2446 2/11/52 5/20/55 9/21/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/53 11/20/54 1	Docket No.	Name of Libelant	Libel Filed	Contracts	Last Ship Redelivered	Last Final Audit	Last Payment to Maritime	Last Item in Account
Stockard S.S. Corp. 10/5/54 9/2/46 2/11/52* 6/20/55 6/25/53 **Pichmann, Wright & 5/13/54 9/2/46 12/10/49* 12/12/52 2/26/53 **Pugh, Inc. Pugh,	24190	American-Foreign S.S. Corp.	11/24/54	6/ 6/46	12/28/49	10/11/54	9/21/53	9/21/53
Pugh, Inc. II/10/54 10/18/46 12/17/49* 11/13/52 2/26/83 A. L. Burbank & Co., 5/27/54 9/26/46 4/13/48* 11/19/54 11/19/54 A. L. Burbank & Co., Inc. North Atl. & Gulf S.S. Co., Inc. North Atl. & Gulf II/27/55 11/18/46 12/24/9* 9/1/53/4* 11/27/53 North Atl. & Gulf II/27/55 11/18/46 12/24/37 No audit yet on after 12/20/53 Inc. Inc. Inc. Inc. Inc. Inc. Inc. Inc	24200	Stockard S.S. Corp.	10/ 5/54	9/ 2/46 8/21/50	2/11/52*	5/20/55 (supplement)	6/23/53	12/21/53
A. L. Burbank & Co., 5/27/54 10/18/46 12/ 7/49* 11/13/52 4/ 6/53*** A. L. Burbank & Co., 5/27/54 9/26/46 4/13/48* 11/ 9/.4 3/16/53 T. J. Stevenson & 3/16/55 11/18/46 12/ 2/49* 9/ 1/534*** North Atl. & Gulf 12/16/54 10/31/46 6/10/48* None yet 5/18/53 North Atl. & Gulf 12/20/55 7/12/46 4/23/51 No audit yet on after 12/20/53 11/28/54 10/24/46 11/28/54 11/28/54 11/28/54 11/28/50 11/28/54	24283	Pugh, Inc.	5/13/54	9/ 2/46	12/10/49*	12/12/52	2/26/53	. 11/20/53
A. L. Burbank & Co., 5/27/54 9/26/46 4/13/48* 11/ 9/.4 3/16/53 Ltd. T. J. Stevenson & 3/16/55 11/18/46 12/ 2/49* 9/ 1/53\dots Co., Inc. North Atl. & Gulf S.S. Co. 12/20/55 11/18/46 12/ 2/49* 9/ 1/53\dots North Atl. & Gulf S.S. Co. 12/20/55 11/18/46 12/ 2/49* 9/ 1/52/53 Luckenbach S.S. Co. 12/20/55 11/18/46 4/23/51 11/28/49 North Atl. & Gulf North A	54584	Polarus S.S. Co., Inc.	11/10/54	10/18/46	12/ 7/49*	11/13/52	4/ 6/53***	12/66/24
T. J. Stevenson & 3/16/55 11/18/46 12/2/49* 9/1/53%* 11/27/53 Co., Inc. Sorth Atl. & Gulf 12/16/54 10/31/46 6/10/48* None yet Sorth Atl. & Gulf 12/16/54 10/31/46 4/23/51 No audit yet on 12/22/53 North Atl. & Gulf 12/20/55 7/12/46 4/23/51 No audit yet on 12/20/53 12/20/53 12/20/55 7/12/46 4/23/51 No audit yet for 11/28/54 11/28/54 11/28/54 11/28/54 North Atl. & Gulf 10/25/54 11/28/54 11/28/54 11/28/54 New York & Cuba 11/27/55 11/12/46 5/28/52* 10/4/54 8/19/55*** Sinch Atl. & Gulf New York & Cuba 11/28/50 Blidberg Rothchild 4/13/56 6/11/28/49 4/16/54 Fall River Navigation 2/14/56 6/11/46 10/28/49 3/10/54 No payments Co. Fall River Navigation 2/14/56 6/11/46 10/28/49 3/10/54 No payments Co.	24285	A. L. Burbank & Co., Ltd.	5/27/54	9/26/46	4/11/48.	11/ 9/64	3/16/53	4/25/55
North Atl. & Gulf 12/16/54 10/31/46 6/10/48* None yet 5/18/53 12/22/53 No payments 12/20/55 7/12/46 4/23/51 No audit yet on after 12/20/53 16/24/46 17/25/46 17/25/46 17/25/46 17/25/46 17/25/4 17/25/46 17/25/48* 11/28/49 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/48 17/25/49 17/25/49 17/25/49 17/25/49 17/25/49 17/28/49 17/26/48 17/28/49	24286	T. J. Stevenson &	3/16/55	11/18/46	12/ 2/49*	9/ 1/5314.	11/27/53	6/10/54
Luckenbach S.S. Co., 12/20/55 7/12/46 4/23/51 No audit yet on after 12/20/53 Ind. 10. 5/51 11/5/51 11/5/54 9/21/53 North Atl. & Gulf 10/24/54 7/12/46 11/5/51 2/13/52* No audit yet for 11/53 9/27/53 S.S. Corp. 4/22/54 4/21/47 2/26/48* 5/12/52 8/18/53 A. H. Bull S.S. Corp. 4/22/54 4/21/47 2/26/48* 5/12/52 8/18/53 New York & Cuba 1/27/55 11/12/46 5/28/52* 10/4/54 9/24/53 Mail S.S. Co. 11/12/46 5/28/52* 10/4/54 8/19/55*** Mail S.S. Co. 11/12/46 5/28/52* 10/4/54 8/19/55*** Blidberg Rothchild 4/13/56 6/25/46 11/28/49 4/16/54 8/19/55*** Co., Inc. Fall River Navigation 2/14/56 6/1/46 10/28/49 *3/10/54 No payments after 2/14/54 Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments after 2/14/54	24287	North Atl. & Gulf S.S. Co.	12/16/54	10/31/46	6/10/48	None yet.	5/18/53 No payments	5/17/54
North Atl. & Gulf 10/24/54 7/1751 2/13/52* No audit yet for 8.8. Corp. A. H. Bull S.S. Corp. 4/22/54 4/21/47 2/26/48* 5/12/52 8/18/53 A. H. Bull S.S. Corp. 4/22/54 4/21/47 2/26/48* 5/12/52 8/18/53 New York & Cuba 1/27/55 11/12/46 5/28/52* 10/4/54 9/24/53 11/28/50 Blidberg Rothehild 4/13/56 6/25/46 11/28/49 4/16/54 8/19/55*** 1 Co., Inc. Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co. 20. 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co. 20. 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co. 3/10/54 After 2/14/54 Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments	154588	Luckenbach S.S. Co., Inc.	12/20/55	7/12/46	4/23/51	No audit yet on 1951 contract	after 12/20/53	
A. H. Bull S.S. Corp. 4/22/54 4/21/47 2/26/48 5/12/52 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/53 8/18/54 8/18/54 11/25/46 11/28/50	54589	North Atl. & Gulf S.S. Corp.	10/21/54	7/17/51	2/13/52*	No audit yet for	9/27/53	5/17/54
New York & Cuba 1/27/55 111/12/46 5/28/52* 10/4/54 9/24/53 11/25/46 11/25/46 11/28/50 11/28/50 11/28/50 11/28/50 11/28/49 4/16/54 8/19/55*** Blidberg Rothchild 4/13/56 6/25/46 11/28/49 4/16/54 8/19/55*** Co., Inc. Pall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments after 2/14/54 6/1/46 10/28/49 3/10/54 No payments after 2/14/56 6/1/46 10/28/49 3/10/54 After 2/14/54 Co.	24291	A. H. Bull S.S. Corp.	4/22/54	4/21/47 9/ 2/46 9/13/46	2/26/48	5/12/52	8/18/53	9/29/53
Blidberg Rothehild 4/13/56 6/25/46 11/28/49 4/16/54 8/19/55*** 1 Co., Inc. Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co. Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co.	24292	New York & Cuba Mail S.S. Co.	1/27/55	11/12/46 11/25/46 10/26/50 11/28/50	5/28/52*	10/ 4/54	9/24/53	12/ 7/54
Fall River Navigation 2/14/56 6/ 1/46 10/28/49 °3/10/54 No payments Co. Fall River Navigation 2/14/56 6/ 1/46 10/28/49 3/10/54 No payments Co. 9/ 2/46 9/ 2/46 10/28/49 3/10/54 after 2/14/54	24400	Blidberg Rothchild Co., Inc.	4/13/56	6/25/46	11/28/49	4/16/54	8/19/55***	11/ 7/56
Fall River Navigation 2/14/56 6/1/46 10/28/49 3/10/54 No payments Co.	24401	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	*3/10/54	No payments after 2/14/54	6/ 9/52
	24402	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	3/10/54

Date of

* Information obtained from exceptive allegations.
** This covers only first cause of action.
*** Setoff; not actual payment.

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IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMERICAN-FOREIGN STEAMSHIP CORPORATION. Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

(and 13 companion cases)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

Order on Petitions for Rehearing Before the Court En Banc-December 19, 1957

The division of the court which heard and decided these appeals having referred the pending petitions for rehearing to the whole court and the court having voted to grant the petitions for en banc procedure,

It is ordered that the rehearing be limited to the jurisdictional question involved and that the submission of that issue be made on written briefs which may in so far as each party desires incorporate by reference its briefs heretofore filed.

It is further ordered that within twenty days the parties file written briefs each containing its statements of position and supporting argument as to the following questions:

For determination of jurisdiction as affected by the stat-

ute of limitations did the statute begin to run

- (1) on the date of redelivery?
- (2) on the dates of the payments recovery of which is sought?
- (3) on the date of the final audit provided for in 137 Clause 13!
- (4) on some variation from the above dates or some other beginning point?

Within ten days after the time above limited for the filing of briefs any party may file a reply brief.

> /s/ HAROLD R. MEDINA C. J.

New York, N.Y., December 19, 1957, (File endorsement omitted)

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IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225-October Term, 1956.

(Argued January 15, 1957

· Original opinion filed September 25, 1957.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24200

STOCKARD STEAMSHIP CORPORATION, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

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No. 24291

A. H. BULL STEAMSHIP Co., BULL-INSULAR LINE, INC., BALTIMORE INSULAR LINE, INC., Libelants. *ppellants,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24283

DICHMANN, WRIGHT & PUGH, INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellees

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No. 24284

Polabus Steamship Co., Inc., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24285

A. L. BURBANK & COMPANY, LTD., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24286

T. J. STEVENSON & Co., INC., Libelant-Appellant,

United States of America, Respondent-Appellee.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP Co., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

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No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

No. 24400

BLIDBERG ROTHCHILD Co., INC., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

Nos. 24401 and 24402

FALL RIVER NAVIGATION Co., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

Before:

CLARK, Chief Judge, MEDINA, HINCKS, WATERMAN and Moore, Circuit Judges.

Consolidated appeals from orders of the United States

District Court for the Southern District of New York,

Palmieri and Herlands, JJ., finally dismissing for
lack of jurisdiction libels to recover funds allegedly
illegally retained by the Maritime Commission in its charter
dealings with the libelants. Reversed as to all appeals
except the Dichmann, Wright & Pugh, Inc. appeal, which
is dismissed, and the dismissal of the sixth cause of libel of
Blidberg Rothchild Co., Inc., which is affirmed.

J. Franklin Fort, Kominers & Fort, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), for all libelants-appellants except American-Foreign Steamship Corp.

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.

Cravath, Swaine & Moore, New York, N. Y., for New York and Cuba Mail Steamship Company. Hill, Betts & Nash, New York, N. Y., for Dichmann, Wright & Pugh, Inc.

Kirlin, Campbell & Keating, New York, N. Y., for A. H. Bull Steamship Co., etc.

Lester Levin, New York, N. Y., for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.

Zock, Petrie, Sheneman & Reid, New York, N. Y., for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company (Roberts & McInnis, Washington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

ARTHUR M. BECKER, Foley, James & Conran, New York, N. Y. (Becker & Maguire and Gerald B. Greenwald, Washington, D. C., of counsel), for libelant-appellant American-Foreign Steamship Corporation.

BENJAMIN H. BERMAN, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., and William E. Gwatkin, III, Atty. Admiralty & Shipping Section, Department of Justice, on the briefs), for United States of America.

Opinion on Rehearing before the Court, En Banc-July 28, 1958

HINCKS, Circuit Judge:

Pursuant to libelants' petitions after the filing of our first opinion in this case, this court on December 19, 1957 granted rehearing en banc' which was limited to the question of determining the proper commencement date of the two-year statute of limitations of the Suits in Admiralty Act, 46 U. S. C. A. §745. Our earlier (unreported) opinion is hereby withdrawn.

^{*} Judge Lumbard has not participated in this appeal.

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales 145 Act, 50 U. S. C. A. App. §1735 et seq., and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, insisted on including in the standard charter provisions calling for excessive additional charter hire and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 et seq., to recover such excess.

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all-cases was more than two years prior

to the commencement of suit.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were timebarred. Judge Herlands, in an unreported memorandum opinion, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because, for failure of timely institution of the actions, jurisdiction was lacking.

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its original reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U.S. C. A. \$1292(3) as express statutory authority for us to entertain this appeal. But our authority

^{*} This action was required under the holdings of prior decisions of this court which will be discussed in this opinion.

to entertain interlocutory admiralty appeals is limited by the requirement of 28 U.S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956. The appeal therefore is too late, and must be dismissed. The Fanny D (Eggers v. Southern Steamship Co.), 5 Cir. 112 F. 2d 347, certiorari denied 311 U. S. 680, Blaske v. Dick, 7 Cir., 126

F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U.S. C. A. App. §1735 et seq., provided for rettal rates in §1738. which incorporated by reference \$709 a -of the Merchant Marine Act, 46 U. S. C. A. \$1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital, The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its

ships pursuant to charters, Clause 13° of which pro-147 vided a sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10%-return. Under these progressive rates the Commission was allowed to recapture as much as 90% of the profits in excess of \$300 per day, per vessel, above the 10% return.

However, the libelants claim that before entering into such charters and before making payments thereunder they

[&]quot; "CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable over-head expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance

objected to the sliding scale rates as contrary to \$709(a) and hence illegal; that by reason of their objections the Maritime Commission assured them that payments of additional charter hire would be deemed preliminary and subject to adjustment until final audit; and that, as a result

of this understanding the final paragraph of Clause.

148 13 was inserted in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. In support of this position, they point to Commission regulations, 46 CFR \$\$299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin, and

with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of \$100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$100 per day but not in excess of \$300 per day—75% on such excess over \$100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessairly employed) in excess of \$300 per day—90% on such excess over \$300 per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout Garters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements of upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

to the Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U.S. C. A. App. 81745(d).

The Government now contends that Clause 13 of the charter is irrelevant to the limitations question and that the statute, of necessity, began to run on the date of payment with the result that all of the libels herein involving payments made before the date of redelivery are time-barred. The Government also argues that jurisdiction is lacking over libels for recovery of payments made after redelivery even if made within two years of suit because such payments as a matter of law were "voluntary" within the meaning of Railroad Co. v. Commissioners, 98 U. S. 541; Cunard S.S. Co. v. Elting, 2 Cir., 97 F. 2d 373. Since these contentions have been raised by exceptive allegations the Government, in reliance on comment in The Ira M.

Hedges, 218 U. S. 264, 270, is contending that the voluntary character of the payments, for which recovery is sought, deprives the court of jurisdiction. The libelants, on the other hand, have placed their reliance on Clause 13, and maintain that under that clause no breach of contract could possibly have occurred until, after "final audit," the Government refused to refund moneys claimed to be due the libelants. In the alternative, the libelants urge recovery on a mutual accounts theory according to which the statute of limitations would begin to run from the date of the last payment of credit entry in the account.

The issues before us have been presented to this court twice before, although in not such comprehensive and forth-right manner as in the present case. In Sword Line v. United States, 2 Cir., 228 F. 2d 344, and in the opinion therein on rehearing, 230 F. 2d 75, affirmed on other grounds 351 U. S. 976, the limitations issue, which had not been raised in the district court, was presented on appeal for

For purposes of this opinion it is not necessary to pass upon this contention. We observe however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional.

^{**} As to the timeliness of the libels, certiosari was denied.

the first time by the United States as appellee. This issue was one of three complex issues raised in the case. The court was in agreement in holding that the libelant's action had no merit because barred by a bankruptcy composition, but on the issue of limitations the majority, as pointed out on rehearing, held that the action accrued upon the date of the payment for which recovery was sought. 230 F. 2d at page 76. Judge Hand's mutual accounts approach was rejected. In American-Eastern Corp. v. United States, 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983, we relied upon the Sword Line ruling and affirmed the lower court without opinion.

opinion on these appeals—the opinion now withdrawn—felt unwilling to depart from the authority of those cases. But now that the court on rehearing has undertaken to proceed en banc, we feel under somewhat less constraint from our past decisions and consider anew on the intrinsic

merits, the issues now before us.

We have come to the conclusion that the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13. This is not the case, frequently occurring, in which money has been collected by the Government by virtue of a statutory direction. The statute involved in this case does not of itself authorize or require payments to the Government. Title 46 U.S.C.A. \$1199(a) declares, "every charter made by the Commission shall provide . . . " Therefore, unless the parties enter into a charter there can be no liability created under §1199(a). Accordingly, we must look to the charter and specifically to Clause 13 if we are to ascertain the rights and liabilities of the parties and evaluate the libelants' contentions that the Commission breached the charter and that the breach occurred not until it failed to return funds to the libelants after final audit and due demand.

When the libelants raised their contentions below, and in earlier cases, the Government's position was that Clause 13 was entirely irrelevant. Consequently, the Government never attacked the libelants' asserted interpretation of that clause: it filed no answers and its exceptive allegations raised no issues of fact. On this rehearing, however, for the first time the Government argues that even if Clause 13



is controlling on the limitations issue the libelants are misinterpreting the language of that clause: it now for the first time suggests that "each final audit" in Clause 13 means each annual audit. But this dispute as to inter-

means each annual audit. But this dispute as to interpretation is plainly one that now appears to involve questions of fact on which extrinsic evidence is admissible. The parties never had occasion to present such evidence. And the particular problem of interpretation has never been passed upon by any judge in these cases or in any other that has been brought to our attention.

As to the interpretation of Clarse 13 and its effect upon claims for the recovery of additional charter hire, we have been presented on appeal with many arguments based on facts alleged in briefs and affidavits, some but not all of which were part of the record below. But since the issue was not raised below, probably because the Government thought it irrelevant under the Sword Line decision. we think the cases should be remanded and the issue should be submitted to the trial judges for findings and determination after giving the Government opportunity to raise such issues of fact as may be desired. This is a case in which parol evidence is admissible on the disputed issue as to interpretation of the charters, Corbin on Contracts. Vol. 3, \$579, and we think we should wait until the relevant record of fact below has been made and completed before we commit the court to any particular interpretation. Our preview, on this appeal, of the contentions of the parties as to Clause 13 leads us to suggest that issues framed thereby are peculiarly appropriate for determination on such evidence as the parties may offer rather than on affi-Pacific-Atlantic Steamship Company v. United States, D. Del. 1955, 127 F. Supp. 931. Of course the burden of proving jurisdiction remains throughout on the libelants. L' Corporation of The Royal Exchange Assurance v. United States, 2 Cir., 75 F. 2d 478. But we think the text of Clause 13 is an adequate, prima facie, showing of jurisdiction in the absence of pleading and proof by the Government that

the libelants' interpretation of Clause 13 is incorrect.

The true intent of Clause 13 having been ascertained, it can then readily be determined whether these suits in so far as they seek recovery of additional charter hire have been brough within the two-year limita-

tion. And any suit thus found to have been timely brought should then, of course, be heard and decided on the merits.

Certain of the libels also include claims not directly based upon the asserted illegality of the progressive rate of additional charter hire under Clause 13. Thus, it is alleged that the Commission, for accounting purposes, improperly split the year 1947 into two segments which had the effect of unduly increasing the libelants' charter hire liability. The Commission's construction of the cumulative accounting provision is also asserted to have improperly increased the libelants' charter hire liability. One libelant asserts that the phrase "capital necessarily employed" as used in Clause 13 has been incorrectly determined with the result that its charter hire liability has been overstated. Another libelant asserts that the Commission improperly reduced its overhead expense, thereby increasing its charter hire liability, by offsetting certain management fees it had received and refusing inclusion of certain post redelivery overhead expenses in "the charterer's fair and reasonable overhead expenses applicable to operation of the vessels" as provided in the first paragraph of Clause 13. Two libelants contend that their charter hire liabilities were improperly increased by the refusal of the Commission to allow the inclusion of certain expenses for agency fees in the overhead expense figure envisioned by the extract from Clause 13 just above quoted. Every one of these claims relates solely to the proper computation of additional charter hire and has no independent basis. We hold that these claims should be dealt with in the same manner as the basic claim for recovery of excessive charter hire.

basic claim for recovery of excessive charter hire.

For all were reserved by Clause 13 until "final audit" whatever that term shall be determined to mean.

A different situation, however, prevails with regard to Blidberg's claim for refund of expenditures for latent defects existing at the time the vessels were delivered on charter as contained in its sixth cause of libel. Such a claim does not come within the express provision of Clause 13 which reserves disputes concerning "additional charter hire." The accrual of this claim, therefore, was not deferred until the final audit and consequently it is time-barred. Isthmian Steamship Co. v. United States, D. C.

S. D. N. Y., 146 F. Supp. 219. Alcoa Steamship Co. v. United States, D. C. S. D. N. Y., 94 F. Supp. 406. However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time-barred.

To the extent that Sword Line and American-Eastern are inconsistent with rulings indicated above, they are over-

ruled.

The appeal of Dichmann, Wright & Pugh, Inc. is dismissed. All other decrees appealed from are reversed and the suits are remanded for further proceedings in accordance with this opinion, except that the dismissal of Blidberg's sixth cause of libel is affirmed.

Waterman, Circuit Judge (Dissenting)

I concur with the majority that the purported appeal in No. 24283, Dichmann, Wright & Pugh, Inc. v. United States, should be dismissed for lack of appellate jurisdiction.

With respect to the issues relative to jurisdiction that the majority find to have been raised in the other thirteen cases and which in their judgment require remand to resolve, I concur in the dissenting opinion of Judge Clark. I would hold, with him, that the respective written instruments in each case, all of which contain the identical Clause 13, need no further judicial consideration below to make them properly interpretable, and that the interpretation placed upon these charter-parties in his dissent is a proper and justifiable one. I believe we should decide now, without more, whether these cases, case by case, are so timebarred as to deprive the courts of any jurisdiction over the respective alleged causes of action, and in the course of so doing I would follow our previous holdings in Sword Line, Inc. v. United States, 228 F. 2d 344 (2 Cir. 1955), affirmed on rehearing, 230 F. 2d 75 (2 Cir. 1956), affirmed, 351 U. S. 976 (1956), and in American Eastern Corp. v. United States, 231 F. 2d 664 (2 Cir. 1956), cert. denied, 351 U. S. 983 (1956). When the libels were dismissed below for lack of jurisdiction libelants moved to amend the dismissed libels in order to present additional grounds to justify the taking of jurisdiction. See A. H. Bull S.S. Co. et al. v. United States, 141 F. Supp. 58, 59-60. Not only were the libels severally dismissed below, but the motions to amend were severally denied; and appeals from the dismissals and the denials of the motions to amend were then taken. What is gained by not taking up these rulings now? Since it is my belief that the rulings below in these thirteen cases were in all respects proper, I would affirm the decisions of Judges Palmieri and Herlands below.

Clark, Chief Judge (Dissenting)

Despite many years on the bench I have still to find an acceptable formula for appellate disposition of a case where the adjudication below gives concern, but falls short of clearly demonstrable error. Of this at least I do feel sure, that a court of review should not attempt to relieve itself of responsibility—get itself off the hook—by merely remanding, i.e., passing the buck back, to the trial court. It should remand only when it has a clear concept of what the trial judge can do to advance the case to final adjudication and precisely states that for his benefit and the benefit of the litigants thus subjected to tantalizing delay.

These basic requirements seem to me quite unfulfilled in the decision herewith. The mandate is merely for remand "for further proceedings in accordance with this opinion." The opinion proper has some further vague suggestions or directions for the "framing" of issues—apparently many of them—and for the taking of testimony—evidently extensive and unlimited—as to each. But the opinion itself demonstrates by the controlling force it gives to Clause 13 of the charters that there is really but a single issue, namely, the interpretation of a written instrument. And on this the record is already complete and the case ripe for final ruling. More precisely stated the issue is whether Clause 13 can be interpreted to control and set aside the normal rule—relied on in our earlier

rulings on the issue1—that on a quasi-contractual claim. for refund of payments asserted to have been erroneously made the right of action accrues and the period of limitation begins to run from the time of the payments. Indeed, the whole tenor of the decision seems to be that, since limitation restrictions are harsh, we must search assiduously-and ask for trial court help thereto-for means to interpret a contract of seemingly different purport to achieve that end. In taking this rather 156 unusual course my brothers give short shrift to the

views of many district judges and of two different panels of this court, whose adjudications the Supreme Court refused to disturb. I think the explanation proffered is inadequate for its task.

To understand what is happening we must consider the state of the existing record before remand. What we are dealing with is a "built-in" statute of limitation forming a very direct boundary to the grant of remedy against the sovereign. 46 U.S.C. §745. This is important in several ways. It shows the strong legislative policy against stale claims against the government. It clearly places the burden of proof upon the claimants to show that they properly come within an unrestricted class. And since it thus vitally delimits the court's jurisdiction, it makes appropriate and normal the usual processes for the testing of issues of federal jurisdiction, as actually had here, namely, motion and affidavit.2 In short, it was incumbent upon the libelants to demonstrate by their affidavits that their libels were timely or, as applied to the issue here, that the negotiations for and background of the charters

¹ Sword Line, Inc. v. United States, 2 Cir., 228 F. 2d 344, affirmed on rehearing 230 F. 2d 75, affirmed 351 U. S. 976; American Eastern Corp. v. United States, D. C. S. D. N. Y., 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983.

² Land v. Dollar, 330 U. S. 731, 735; KVOS, Inc. v. Associated Press, 299 U. S. 269, 278; Central Mexico Light & Power Co. v. Munch, 2 Cir., 116 F. 2d 85; Williams v. Minnesota Min. & Mfg. Co., D. C. S. D. Cal., 14 F. R. D. 1; Ramirez & Feraud Chili Co. v. Las Palmas Food Co., D. C. S. D. Cal., 146. F. Supp. 594, 597, affirmed Las Palmas Food Co. v. Ramirez & Feraud Chili Co., 9 Cir., 245 F. 2d 874, certiorari denied 355 U. S. 927; and see full discussoin in 6 Moore's Federal Practice ¶ 56.03, pp. 2027, 2028 (2d Ed. 1953), also 5 id. ¶ 38.36, pp. 290-292 (2d Ed. 1951), 2 id. ¶ 12.09, pp. 2248-2250, 2256, ¶ 12.14 (2d Ed. 1948).

showed the correct interpretaion of Clause 13 to be one for extending the time of suit. And this they attempted with at least a wealth of material, however pertinent it may be thought to be.

It is, indeed, a reflection upon able and shrewd counsel to believe that, faced with the legal requirement and practical necessity of disclosure, they should have

157 held back relevant and convincing material, . One of the more confusing aspects of the decision is that it is not clear how far it is intended to repudiate the normal procedure for testing issues of federal jurisdiction as shown by the cases cited in my footnote 2 supra. In any event we cannot expect miracles of counsel; anything more they bring to a new trial will be only cumulative to what is already before us. Obviously were there oral evidence of direct statements of intent on the part of the negotiators now presently remembered (none has been suggested), such evidence could not be used to control or vary the written document. All the material useful for decision is actually at hand; I do not see why my brothers do not employ it for final adjudication that jurisdiction exists if such is the way they feel they much go. The obstacles will not be any the less after two or three more years of protracted litigation.

That this is their direction is, I think, to be fairly deduced from the opinion, even though the discussion therein is limited. Not only does it accept the text of Clause 13 as "an adequate, prima facie, showing of jurisdiction," but it takes the highly drastic and quite confusing course of overruling out of hand our two previous rulings to the contrary cited in my note 1 supra. What reason is there for overruling Sword Line and American Eastern if eyentually they may be held correctly decided? Indeed, in the present state of division in the court, what reason or effect

is there to this declaration in any event?3

Let us look more closely at this "prima facie" ruling. In interpreting the writing we must start with the congressional policy disfavoring stale claims. I see no reason here

³ It is made by a minority only of the active judges, against the expressed view of other judges who may ultimately prevail. An overruling so deficiently based can only mislead the unwary.

for exceptional treatment. The contracts were made, the services performed, and the rayments made a decade or more ago. And what is more, the ships were actually returned to the government, thus entirely closing the transactions, almost a decade ago. It is especially strange, if these were live issues where the government was expected to make vast refunds, that some of the rental payments were actually made after the ships were returned. One can understand belated payments by the charterers if they thought the lire was actually due, but hardly if they were preparing to claim that there had already been gross overpayment. If ever stale claims against the government are to be viewed with a jaundiced eye, these would seem to be the occasion.

Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment; nor does it in any way suggest that it was meant to deal with the processing of claims for refund. Clearly it is what is labeled as being, namely, a provision for "Additional Charter Hire." It follows naturally after Clause 12, covering "Basic Charter Hire," and in its main. section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any calendar wear. The emphasis on yearly accountings is obvious. The particular provisions here in issue come at the end and deal with preliminary and final payments of such additional charter hire, based on the scale stated. So a method is provided whereby the government can ask and receive preliminary payments as the money is earned, and the "final audits" clearly refer to the yearly settlements thus made necessary. Quite simply they are necessary because the progressive rate of additional hire depends on the amount of cumulative profits for the year. They just

159 do not fit the concept of an ultimate and probably long delayed settlement of all disputes which might conceivably arise under any of the manifold provisions of these extensive charters. Significantly a much later charter provision does look to such possibility, thereby affording

^{. 4} Some of the payments were actually made within the two year limitation; while these are not separately noted in the opinion, they seem barrd as voluntary payments.

a persuasive contrast. For Clause 28 deals with "Accounting, Report and Supervision" and requires the keeping of books, the filing of financial statements, and the like covering all transactions, while it also authorizes the auditing of all books and the maintenance of checks and controls of expenditures and revenues in connection with the operation

of any of the chartered vessels.

In the final paragraph of Clause 13 the preliminary statements therein referred to are correlated with the final audit. This places a well-nigh insuperable obstacle in the way of the interpretation claimed by libelants. For the "adjustment" visualized is to be had "either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner"; the idea is carried further thus, "at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." Each final audit therefore serves a function of settling the payments due on each calendar year's profits. Thus it fits properly with the rest of the clause. It cannot be made to mean some final settlement of all and sundry differences a decade or more hence when at length both parties are prepared to have a balance struck. Thus the government's brief is correct in saying: "Thus the charterers' right to file a claim for adjustment and refund of an overpayment of additional hire and to bring immediate suit if refund was not made is precisely the same at the time of a charterer's rendition of its preliminary accountings and at the time of the owner's final audit."

Maritime Administration regulations which (1) require the charterer at the end of each calendar month to pay 90 per cent of the additional charter hire then indicated to be due, 46 CFR 299.31(k)(1); (2) provide that such payments are preliminary and subject to adjustment upon completion of audit by the government covering the period involved (the calendar year), id.; (3) provide that tender of the monthly payments and their acceptance do not prejudice rights under the charter or otherwise, id.; (4) require remittance of monthly payments to be accompanied by a preliminary statement, 46 CFR 299.31(k)(2); (5)

provide that if this statement indicates that 90 per cent of the cumulative total for the expired portions of the period involved (calendar year) is less than the total of payments theretofore made for the period, the charteer may apply for a refund, 46 CFR 299.31(k)(5); and (6) require each charterer to submit a separate final accounting of additional charter hire for each annual or over-all accounting period [which under 46 CFR 299.37-1(h) and (i) is defined as a calendar year or a period less than a calendar year, 46 CFR 299.37-2(b)1. Hence, simply put, Clause 13, read with the regulations, provides that the charterers must make monthly payments on account of the additional charter hire which are preliminary because only upon the rendition of preliminary statements or upon final audit for the year will the parties know, whether or not the amounts of the monthly payments were correct.

Neither in wording nor in practical operability, however, is the Clause appropriate for the adjustment of the type of "overpayment" here involved. For the charterers knew that as they read the law the sums here claimed were not correct even when remitted. So there is no suggestion

anywhere in the contract that the earlier language in Clause 13 bears on these "overpayments" in any way. Nor is there any suggestion in Clause 13 or in the regulations that the preliminary payments are tentative because the charterers believed the Clause to be illegal or that the parties agreed to put off a judicial determination of the legality of the rates. It is a strange contract which would preclude suit by the charterers to reform the contract or to recover the specific monthly "overpayments" if actually illegal. But, as the opinion herewith makes clear, libel- 4 ants to succeed must rely on such an interpretation, viz. that the phrase "each final audit" can mean only some type. of closing-out accounting which ultimately and finally terminates all relations between the charterers and the United States. I submit with all deference that the mere statement of the argument betrays its weakness; without fairly conclusive support somewhere for such a reading there is no "prima facie showing of jurisdiction." Surely the parties did not intend an agreement to require the deposits of huge sums of money for an indefinite time pending determination of the legality of the contract rates.

quite clearly the period of limitation can start only when the parties agree and are content that they have eventually obtained an ultimate closing-out accounting. Ironically enough, since even late deposits are to be included, there is nothing to prevent the charterers from continuing to make the government a good and safe depositary, paying better than market rates of interest, for their excess funds. Hence for my part I cannot accept this as permissible interpretation against respondent's persuasive showing (wholly consistent with both the charters and the regulations) that "each final audit" means an audit of the charterers' yearly profits.

It is true that the libelants ably and ingeniously develop various arguments from the background material in an en-

deavor to combat this analysis. Doubtless they will fashion others if allowed to prolong the proceedings.

But the very ingenuity exercised, viewed against the results achieved, suggests how pressing is their need for an argumentative support which they still find lacking. At hardly seems worth while now to discuss these arguments at length beyond a general suggestion of their weakness. They deal either with supposed inconsistencies with the government's present position, such as segregation of accounts or the like, or with claimed admissions by the Maritime officials. The principle against waiver of public rights by government officers would make these dubious in any event; but even more important is the fact that the insistencies or waivers are apparent only to those predisposed to see them. They obviously did not occur to the officials at the time. Unconscious waiver of public rights is not a legal principle to be pressed far.

The opinion states that the government for a considerable time concealed its present and ultimate contention. That charge, if important, does not seem to me to be sustained on the record. Appellants have vacillated in the theories they would rely upon, and seemingly have come to a choice of Clause 13 only recently. As the case developed there was not early occasion for the government to be more specific in its opposition (which has always been steady and continuous) than it has been. And its position has been reasonably well known, as was apparent in the earlier cases before us. So Judge Walsh, ably analyzing these points

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in the trial court in the American Eastern case, D. C. S. D. N. Y., 133 F. Supp. 11, 16 (cited in note 1 supra), well concludes:

"The labyrinthine aspect of the charter and regulations which libelant has seen fit to exaggerate are really only superficial." They are to be expected in any administrative attempt to deal with a complex subject matter on a mass scale. Care must be taken not to permit their seeming complexity to confuse the elementary simplicity of the dealings between the parties."

In any event the point cannot be of controlling importance, since we have now come quite completely to the point where we enforce justice and the law, notwithstanding pos-

sible deficiencies in presentation by the lawyers.5

Consequently I must conclude that the procedure here does not require, but indeed makes anomalous, any further trial or delay in adjudication. The case is ripe for final settlement, which should now be had, of the jurisdiction And any termination which does not follow the simple course stated in Sword Line and applied in American Eastern runs into serious difficulties, as resting upon a strained interpretation of a written instrument. Here some note should be taken of our procedure. These cases were originally argued on January 15, 1957. The process of decision, particularly the rehearing in banc, land delayed action now for a year and a half, and the end is of course not yet in sight. I fear nothing has been achieved by the delay but the accentuation of our differences, with no progress toward their adjustment. Had the case been terminated by February 1957 by decision of the original panel, with a concise statement of our disagreement-a matter of interest, which the public is entitled to knowbut without attempting the supposed, though illusory,

⁵ Sec, e.g., United States v. Bess, 78 S. Ct. 1054; Trop v. Dulles, 356 U. S. 86, reversing 2 Cir., 239 F. 24 527; Vibra Brush Corp. v. Schaffer, 2 Cir., May 13, 1958; Columbia Research Corp. v. Schaffer, 2 Cir., May 13, 1958, Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliancerv. Delaware, L. & W. R. Co., 2 Cir., 157 F. 2d 417, 420; Massachusetts Bonding & Iys. Co. v. State of New York, 2 Cir., July 11, 1958.

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reconciliation of views to be obtained by a hearing in banc, every one, it seems, would have profited.

Hence I would affirm the decisions reached below 164 by able district judges in accordance with views heretofore expressed by this court. I should add that of course I do not object to the dispositions made of certain libels not presenting the main issue. But as to this issue, since there would seem a distinct possibility of its going higher-in view of its great importance involving, inter alia, the premature and undefined overruling of previously settled Vorecedents-I do feel an obligation to mention the further question here definitely presented as to the effect of a vote by a judge retired from regular active service under 28 U. S. C. § 371(b) upon an appeal which has been ordered heard in banc. The question arises because the governing. statute 28 U. S. C. § 46(c) says: "A court in bane shall consist of all active circuit judges of the circuit"; and Judge Medina, whose vote is here decisive, took advantage of the retirement provisions of 28 U.S. C. § 371(b) on March 1 last. I do not like to raise the question (which obviously can be settled only by the Supreme Court or by corrective legislation) because I have been active in inducing retired colleagues to sit and because I regard. their continued participation in cases committed to their consideration desirable and beneficial all around. And I think this conclusion also applies to retired District Judge Leibell, who sat on the original panel herein which voted for affirmance. But the matter has caused doubt and uncertainty in other cases we have had, and a definitive answer is urgently desirable.

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IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present:

Hon. Charles E. Clark, Chief Judge.

HON. HAROLD R. MEDINA,

HON. CARROLL C. HINCKS,

Hon. Sterry R. Waterman, 2

Hon. Leonard P. Moore, Circuit Judges.

> American Foreign Steamship Corp., Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee.

Judgment-July 28, 1958

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that the opinion of this court, dated September

25, 1957, be and it hereby is withdrawn.

Further ordered that the judgment of this court, dated September 25, 1957, be and it hereby is vacated and that a judgment be entered on the opinion of this court rendered July 28, 1958.

A: Daniel Fusaro Clerk

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(File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Submitted August 26, 1958 Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

AMERICAN-FOREIGN STEAMSHIP CORPORATION, Libelant-Appellant,

UNITED STATES OF AMERICA, Respondent-Appellee, And thirteen companion cases.

Before:

MEDINA, HINCKS, WATERMAN and MOORE, Circuit Judges.

Petition of Appellee for Further Rehearing en Banc

George Cochran Doub, Assistant Attorney General, Washington, D. C., Arthur H. Christy, United States Attorney, Southern District of New York, New York, N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice, and William E. Gwatkin, III, Atty, Admiralty & Shipping Section, Dept. of Justice, pr petitioner.

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Opinion-March 26, 1959

HINCKS, Circuit Judge:

The United States, as appellee, attacks the decision carried in our opinion of July 28, 1958, on the ground, inter alia, that Judge Medina, who concurred therein, by virtue of his retirement on March 1, 1958 was disqualified under 28 U. S. C. A. § 46(c) from participating. We disagree.

of our earlier decision before the court in banc. The court in banc comprised Chief Judge Clark, Judges Medina, Hincks, Waterman and Moore, all then active circuit judges. Judge Lumbard declined to sit with the court on the ground that he was disqualified by reason of earlier contacts with the cases below when serving as United States Attorney. The court in banc when thus constituted conformed in all respects to 28 U.S.C.A. § 46(c) which provides: "A court in bane shall consist of all active judges of the circuit." Since Judge Medina was a member of the court in banc which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once constituted according to law, whether in banc or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed. As the Reviser's note indicates, 8 46 was included in the Code of 1948 to preserve the interpretation established by Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 314 U.S. 326, that notwithstanding the three-judge provision of \$ 212 of Title 28 U.S.C., 1940 Ed., a court of appeals might lawfully consist of a greater number of judges sitting in banc. Nothing in Textile Mills nor the Code provisions which preserve its interpretation suggests that retirement under 28 U.S.C.A. § 371 operates to 169 terminate the power of the retiring judge as a member of the court in banc to participate in the decision

It was on December 19, 1957 that we granted rehearing

terminate the power of the retiring judge as a member of the court in banc to participate in the decision of a case formerly assigned to the court but as yet undecided. We have found no reported case which so holds. We think the case of Commercial National Bank in Shreveport v. Connolly, 5 Cir., 177 F. 2d 514, supports our conclusion that the competence of a judge who is once duly constituted a member of a court in banc, may survive his retirement. There Judge Sibley who as an active member of the Fifth Circuit Court of Appeals had participated in the decision of a case heard in banc, thereafter retired

(on October 1, 1949) and subsequently cast the decisive vote for an order (filed November 16, 1949) denying a petition for rehearing which had been made to the court in banc.

Moreover, \$43(b) of the Code of 1948 provides: "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." This provision is not stated to be exclusive of the "judges designated or assigned" to hear and determine a case as members of a court in banc. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in \$46(b) and to judges designated and assigned under \$\$294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under \$46(c) was designated and assigned as a member of the court in banc was competent even after his retirement to sit under \$\$43(b), 294(b) and 296.

The other claims of error raised in the petition we think unfounded. They involve matters already carefully considered by us. And the requested clarifications we think unnecessary and inappropriate. We have reversed and

remanded for a determination of jurisdiction and, if jurisdiction be sustained, of the merits. We have made it plain that these determinations should be made without constraint by Sword Line v. United States, 2 Cir., 228 F. 2d 344, and American Eastern Corp. v. United States, 2 Cir., 231 F. 2d 664, and of course in conformity with our opinion of July 28, 1958. The questions now put to us are questions for answer by the parties and the trial court.

Petition denied.

Separate Statement of Clark, Chief Judge, and Waterman, Circuit Judge

Judge Hincks' opinion herewith demonstrates both the difficulty and the impracticability of interpreting the governing statute, 28-U. S. C. § 46(c), otherwise than by giving the word "determined" its normal meaning of "decided," and the word "active" its natural force of "non-retired."

This view is underlined by the contrast drawn between judges "in active service" and "retired" judges, even though designated to sit, in the several statutes such as 28 U. S. C. §§ 294(b) and (d), 295, 296, and 351(b). It appears to be the general conclusion of other circuits. In re Sawyer, 9 Cir., 260 F. 2d 189, 203, n. 17, certiorari granted 358 U. S. 892; G. H. Miller & Co. v. United States, 7 Cir., 260 F. 2d 286, 305; United States v. Gordon, 7 Cir., 253 F. 2d 177, 185, 191, 194; see also United States v. Sentinel Fire Ins. Co., 5 Cir., 178 F. 2d 217, 239, and Commercial Nat. Bank, in Shreveport v. Connolly, 5 Cir., 177 F. 2d 514, interpreted in the light of Fifth Circuit Rule 29 stating the vote required for a rehearing. And it has been the uniform practice of our own elder colleagues. Reardon v. California Tanker Co., 2 Cir., 260 F. 2d 369, 375, 376, certiorari denied California Tanker Co. v. Reardon, S. Ct., March 2, 1959; United States v. Silverman, 2 Cir., 248 F. 2d

'671, 696, certiorari denied 355 U.S. 942; Harmar Drive-In Theatre v. Warner Bros. Pictures, 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824. Moreover, it is necessary if the obviously indicated policy that the active circuit judges shall determine the major doctrinal trends of the future for their court is not be to flouted by the freezing in of a particular grouping of judges for months (as here) or even for years. And so notwithstanding some personal regret and even doubt as to the ultimate wisdom of the policy, it must be held that the decision of July 28, 1958, purporting to reverse the decrees below is ineffective and void for lack of a valid majority vote and those decrees under consideration here must stand affirmed by an equally divided court, People v. Bork, 96 N. Y. 188, 199; Watson v. Payne, 94 Vt. 299, 111 A. 462.

IN UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Present:

Hon, Charles E. Clark,
Chief Judge.
Hon. Harold R. Medina,
Hon. Carroll C. Hincks,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Circuit Judges.

AMERICAN FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

٧.

UNITED STATES OF AMERICA, Respondent-Appellee.

Order Denying Government's Petition for Further Rehearing En Banc—March 26, 1959

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A, DANIEL FOSARO

173

(File endorsement omitted)

No.

October Term, 1958

AMERICAN-FOREIGN STEAMSHIP CORPORATION, ET AL., Petitioners,

V

THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari— August 24, 1959

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August 24, 1959.

JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

Dated this 10th day of June, 1959.

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SUPREME COURT OF THE UNITED STATES

No. 138

October Term, 1959

UNITED STATES OF AMERICA, Petitioner,

V.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

Order Allowing Certiorari-October 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
JUN 23 1959
JAMES R. DROWNING, Clerk

No. - 138

In the Supreme Court of the United States

Occorne Trant, 1958

United States of America, emittioner

AMERICAN-FORMON STRANSHIP CORP., MT AL.

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J. LES BASES.

Entirier General,
Chapters Attorney General,
Analy & Rossing Hall,
LEGALORY & MORROS,

Department of Justice, Washington \$5, D.O.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. -

UNITED STATES OF AMERICA, PETITIONER

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above cases on July 28, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Palmieri, D.J.) covering 11 of the 14 libels involved is reported as A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D.J.) covering the other three libels is not reported, but it is set forth in footnote 2 to the opinion of the three-judge panel of the United States Court of Appeals for the Second Circuit reported at 265 F. 2d 136, 140 (App., infra., p. 16). The opinion of the three-judge panel of the Court of Appeals, dated September 25, 1957, the opinion of the Court of Appeals on petition for rehearing en banc, dated July 28, 1958, and the opinion of the Court of Appeals denying the petition for further rehearing en banc, dated March 26, 1959, are reported at 265 F. 2d 136, and are set forth in the Appendix, infra, pp. 14-48. The Court of Appeals' orders of July 28, 1958, and March 26, 1959, are set forth in the Appendix, infra, pp. 48-50.

JURISDICTION 3

The opinion of the three-judge panel of the Court of Appeals was entered on September 25, 1957 (App., infra, p. 14). Respondents filed a timely petition for rehearing en banc which was granted on December 19, 1957 (App. infra, p. 23). The judgments of the Court of Appeals, sitting en banc, were entered on July 28, 1958 (App., infra, pp. 48-49). The United States then filed a petition for further rehearing en banc which was entertained by the Court of Appeals. In its opinion of March 26, 1959, the Court of Appeals denied the petition for further rehearing en banc (App., infra, pp. 44-48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a circuit judge who retires prior to the decision of a court of appeals sitting on reheating en

We have set forth in the Appendix only the orders in the American-Foreign Steamship Corp. appeal, the orders in the other cases to which this petition is directed being identical.

banc is an "octive" circuit judge entitled to participate in the in banc decision under 28 U.S.C. 46(c).

STATUTE INVOLVED

28 U.S.C. 46(c) provides:

Case and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in bane is ordered by a majority of the circuit judges of the circuit who are in active service. A court in bane shall consist of all active circuit judges of the circuit.

STATEMENT

1. THE NATURE OF THE LITIGATION

Each of the respondents chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U.S.C. App. 1735, et seq., and agreed in Clause 132 of their charters to terms which made additional charter hire depend in part on the amount of profit realized by the charterer. Respondents libels below were predicated on the claim that the Maritime Commission, in providing for a "stiding scale" whereby the Government might obtain as much as 90% of the profifs in excess of \$300 per day, per vessel, above a certain return on employed capital, violated the provisions of Section 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 E.S.C. 1199(a), allegedly limiting the Government to a flat 50% of profits above the return on employed capital. Respondents thus sought to recover amounts of addi-

² Clause 13 of the charters is set out in its entirety as footnote 3 to the July 28, 1958 opinion of the Court of Appeals on rehearing en bane (App., infra, pp. 25-26).

tional charter hire in excess of this 50% rate, on the theory that such amounts were illegally assessed by the Commission. In addition, certain of the libels challenged the Maritime Commission's determinations under the charters as to the amount of "capital necessarily employed", the "post redelivery overhead expenses", the "cost of repairing latent defects", "management fees" and "agency fees".

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims were barred by the two-year limitation period prescribed by the Suits in Admiralty Act, 46 U.S.C. 745.

2. THE PROCEEDINGS BELOW

In the district court, the libels were dismissed by Judges Palmieri and Herlands as time-barred on the authority of the Second Circuit decisions in Sword Line, Inc. v. United States, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed on the question of admiralty jurisdiction, 351 U.S. 976, and American Eastern Corp. v. United States, 133 F. Supp. 11 (SD.N.Y.), affirmed per curiam, 231 F. 2d 664, certiorari denied, 351 U.S. 983.

These decisions were affirmed on September 25,

³ Judge Palmieri's opinion, as we have noted, is reported at 141 F. Supp. 58, and Judge Harlands' can be found in footnote 2 to the opinion of the three-judge panel of the Court of Appeals (App., infra, p. 16).

⁴The appeal of one of the libelants—Dichmann, Wright and Pugh—was dismissed as an interlocutory admiralty appeal filed out of time (App., infra, pp. 16-17). On the en banc reversal with regard to the other libels, the decision as to this one appeal was reaffirmed (App., infra, p. 24).

1957, by a three-judge panel of the Second Circuit consisting of active Circuit Judges Hincks and Medina and District Judge Leibell. The court ruled that the various arguments advanced by respondents to avoid the statute of limitations had been urged by the libelants on the identical issue in the earlier Sword Line and American Eastern cases, and had been disposed of by these decisions (App., infra, pp. 14-22).

On December 19, 1957, the Court of Appeals entered an order granting a petition for a rehearing en banc on the question of the statute of limitations and further ordered that argument was to be confined to briefs alone (App., infra, p. 23). The order, signed by Judge Medina who was at that time an active circuit judge, required that briefs be submitted within twenty days. On March 1, 1958, Judge Medina retired pursuant to the provisions of 28 U.S.C. 371(b) (App., infra, p. 44)...

On July 28, 1958, almost five months subsequent to Judge Medina's retirement, the Court of Appeals handed down its en banc decision reversing the district court decisions. The majority consisted of active Circuit Judges Hincks and Moore and retired Circuit Judge Medina; the dissenters were active Circuit Judges Clark and Waterman. The majority, in an opinion written by Judge Hincks, overruled the prior

Active Circuit Judge Lumbard did not participate in the en banc proceeding because of a prior connection with these cases as United States Attorney,

There had been no indication, following Judge Medina's retirement, that he would participate in the decision of the cases on rehearing.

that Clause 13 of the charters established an adequate prima facie showing of jurisdiction. The court further determined, however, that the parties should be given an opportunity to adduce evidence respecting the intended meaning of Clause 13. Accordingly, it remanded the causes to the district court for a disposition on limitations which might take into account such evidence as might be introduced (App., infra, pp. 23-32).

In a dissenting opinion concurred in by Judge Waterman, Chief Judge Clark observed that the normal rule in actions for unjust enrichment, as declared by the Second Circuit in ruling on the same question of limitations in Sword Line and American Eastern, is that the period begins to run when the first payment of additional charter hire is made. This rule should be set aside, he said, only if the charter plainly manifests a contrary purpose; yet, the majority had found no such contrary expression of intention in Clause 13. Moreover, analysis of this clause and the underlying regulations demonstrated to him that the earlier decisions in Sword Line and American Eastern were correct. Finally, Judge Clark expressed doubt as to the validity of Judge Medina's participation in the en banc decision reached subsequent to his retirement. He stated that confusion surrounds this question and that its resolution by this Court is "urgently desirable" (App., infra, pp. 34-44).

[•] These libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in Sword Line, Inc. v. United States, 351 U.S. 976.

The Government then filed a petition for further rehearing en banc, directed primarily to the question of the validity of Judge Medina's participation in the en banc determination. On March 26, 1959, this petition was denied, the court dividing as it had on the prior en banc decision. The majority of Judges Hincks, Moore and Medina (in an opinion by Judge Hincks) ruled that ence an en banc court is validly constituted under 28 U.S.C. 46(c), supra, p. 3, the statute does not require the court to "suspend its * * * task" or "reconstitute itself" upon the retirement of an active judge (App., infra, pp. 44-47).

In a separate statement, Judges Clark and Waterman expressed the view that Judge Medina's action was precluded by the plain language of 28 U.S.C. 46(c). They pointed out that their construction of 46(c) was apparently shared by the other circuits. It was their conclusion that the en banc decision of July 28, 1958, was "void for lack of a valid majority vote" and that the decrees of the district courts "must stand affirmed by an equally divided court" (App., infra, pp. 47-48).

REASONS FOR GRANTING THE WRIT

The question of the validity of Judge Medina's participation in the en banc decision in this case raises a question of general importance in the administration of justice by the courts of appeals. The issue is one of statutory interretation: it is not a matter of discretion. Judge Medina's action, which here resulted in a different en banc determination from that which would have been reached had participation been lim-

to the active judges, appears to us to be contrary to the controlling statutory provision and irreconcilable with the purposes which motivated it. In addition, the divergence of opinion among the courts of appeals on the general question of the role of retired judges in en banc proceedings calls for a definitive resolution of the matter by this Court in the exercise of its "general power to supervise the administration of justice in the federal courts". Western Pacific Railroad Case, 345 U.S. 247, 260.

1. Judge Medina's participation in the en banc determination of July 28, 1958, contravenes the express terms of 28 U.S.C. 46(c), supra, p. 3. That statute provides that cases will be heard and determined by a court or division of not more than three judges, except for en banc proceedings. It further provides that a hearing or rehearing en banc can only be granted by a majority of the active circuit judges, and, if granted, the court en banc will consist of all the active circuit judges of the circuit.

In view of these provisions, it seems clear that in an en banc, as distinguished from a panel, proceeding only active circuit judges can hear and determine the cause. Thus, while Judge Medina had the power to participate in the decision to grant rehearing en banc on December 19, 1957, and to hear the case (by studying the briefs) until March 1, 1958, his retirement on the latter date precluded him from participating in the en banc decision of July 28, 1958.

In reaching a contrary conclusion, the majority of the court below appears to have drawn a distinction between the situation where retirement occurs before the grant of a petition to rehear en banc and the situation where (as here) the retirement occurs in the interval between such grant and the date of decision (App., infra, pp. 45-46). But this does not seem a permissible interpretation, for the grant of power to determine—as well as to hear—is expressly reserved to active judges. Moreover, the distinction ignores the underlying objective of en banc proceedings: a decision that will avoid intra-circuit conflict. It is, of course, the decision, and the power to participate in that decision, that is crucial. As Mr. Justice Frankfurter observed in his concurring opinion in Western Pacific Railroad Case, 345 U.S. 247, 270:

* * determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. * * *

Although the legislative history of Section 46(c) itself sheds little light on the issue here, the history of a substantially similar predecessor bill (S. 1053, 77th Cong., 1st Sess.) which died in the Senate sup-

⁷ It should be noted that, under Section 46(c), only a majority of active judges can order a rehearing en banc. In view of this provision, it would be anomalous indeed to hold, as did the majority below, that the decision of a non-active judge could be determinative on the ultimate en banc disposition of the case.

The Reviser's Note to Section 46(c) states that the provision was intended to codify the result in Textile Mills Corp. v. Commissioner, 314 U.S. 326. In Textile Mills this Court, ruling that en banc hearings involving more than three circuit judges were valid under applicable statute, upheld a rule of the Third Circuit permitting all active circuit judges to participate in en banc proceedings. In so doing, the Court carefully distinguished "active" from "retired". 314 U.S. at 327.

ports our interpretation. In hearings on that bill, Circuit Judges Groner and Biggs, testifying to the importance of en banc determinations in cortain classes of cases, referred repeatedly to the number of active circuit judges in the various circuits who would participate in such decisions. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054, and H.R. 138, 77th Cong., 1st Sess., at pp. 15, 40-41. No mention was made of participation by retired judges, despite their possible participation in resolution or hearing of the case prior to en banc determination and despite some concern over the question of tie votes in circuits having an even number of active judges.

The provisions of 28 U.S.C. 43(b), 294, 295 and 296, on which the majority below placed some reliance. do not affect the conclusion which flows from 28 U.S.C. 46(c), i.e., that only active judges may hear and determine en banc proceedings. 28 U.S.C. 43(b) deals generally with the composition of courts of appeals, and the other sections relate to the designation and assignment of retired circuit judges. None of these sections purports to deal with the subject of en banc proceedings, specifically covered by Section . Moreover, the powers conferred on retired judges under 28 U.S.C. 296 are solely those conferred by the Chief Judge of the circuit. Following his retirement, Judge Medina did not receive a designation and assignment in this case. Plainly, Chief Judge Clark did not purport in any way to invest Judge

^o See also H. Rep. No. 1246, 77th Cong., 1st Sess., and Annual Report of the Attorney General (1939), pp. 15-16.

Medina with the power to participate in the en banc decision.

2. The issue raised by this petition is attended by conflict and confusion, both within the Second Circuit and elsewhere, Although Judge Medina did not consider his retirement to preclude him from deciding the instant litigation, he did withdraw from an en banc proceeding in another case after taking part in the original panel decision. Reardon v. California Tanker Co., 260 F. 2d 369, certiorari denied, 359 U.S. 926. In that case, Judge Medina had retired prior to the granting of the petition for rehearing en banc, but, as observed above, this is hardly a distinguishing circumstance since the crucial issue is the power to dispose of the case on the merits. Other Second Circuit judges have similarly withdrawn from en banc participation upon retirement from active service. United States v. Silverman, 248 F. 2d 671, 696, certiorari denied, 355 U.S. 942; Harmar Drive-In Theatre, Inc. v. Warner Bros., 241 F. 2d 937, certiorari denied, 355 U.S. 824.

In two cases exactly like this one, the Ninth Circuit reached conflicting results. In *In re Sawyer*, 260 F. 2d 189, 203, fn. 17, certiorari granted, 358 U.S. 892, No. 326, this Term, Chief Judge Denman presided at the oral argument of the case heard *en banc*. He retired, however, between the date of hearing and the date of decision, and thereupon withdrew from participation in the *en banc* decision. Retired Judges

¹⁰ As we have noted, *supra*, p. 5, the Second Circuit's order granting respondents' petition for rehearing *en banc* in this case limited argument to briefs alone.

Bone and Orr, on the other hand, participated in an en banc decision after retiring just prior to its rendition. Herzog v. United States, 235 F. 2d 664, 670, fn., certiorari denied, 352 U.S. 844.

The view of the majority of the Seventh Circuit, including Chief Judge Duffy (see G. H. Miller & Co. v. United States, 260 F. 2d 286, 291-292, certiorari denied, 359 U.S. 907), is that a retired judge may not participate either in voting on the petition for rehearing en banc or in the rehearing itself, if granted. In two Seventh Circuit cases, retired Judge Major, who had been assigned to sit on the three-judge panel, was not allowed to participate in the subsequent en banc rehearing. Judge Schnackenberg dissented on grounds substantially similar to those adopted by the majority below. G. H. Miller & Co. v. United States, supra; United States v. Gordon, 253 F. 2d 177.

Although the Fifth Circuit has not considered the question whether a retired circuit judge may participate in a rehearing en banc, it has dealt with the related question of a retired judge's right to cast a vote for or against the grant of a petition for rehearing en banc. Commercial Nat. Bank in Shreveport v. Connolly, 177 F. 2d 514; United States v. Sentinel Fire Ins. Co., 178 F. 2d 217, 239. What conclusion the court reached is doubtful—as is evidenced by the fact that in the instant case both Judges Clark and Hincks (App., infra, pp. 47, 46) found support in the two cited Fifth Circuit cases. In both Commercial Nat. Bank and Sentinel Fire Ins., petitions for rehearing en banc were denied per curiam. The four active circuit judges were evenly divided on whether the

petitions should be granted. Judge Hincks draws the inference that the fifth judge—retired Judge Sibley—must have voted for denial of the petition. Judge Clark infers, however, that Judge Sibley did not participate and that the petitions were denied for lack of a majority in favor of granting.

CONCLUSION

The participation of a retired circuit judge in the decision en banc rendered in this case—a participation which tipped the scales and resulted in a reversal of Second Circuit precedents—was, in our view, contrary to the provisions of the controlling statute. It is evident that the issue of correct judicial procedure posed by this case has engendered uncertainty and conflict both in the Second Circuit and in other circuits. The matter is thus one of general importance to the administration of justice in the several courts of appeals. As the Chief Judge of the Second Circuit has urged, it should be residued by decision of this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HERBERT E. MORRIS,
Attorneys.

June 1959.

APPENDIX

1. Three-judge Panel Opinion of the Court of Appeals

United States Court of Appeals for the Second Circuit

Nos. 126, 135, 214–225—October Term, 1956 (Argued January 15, 1957. Decided September 25, 1957) Docket Nos. 24190, 24200, 24291–2, 24283–9, 24400–2,

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION, LIBELANT-APPELLANT,

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE.
(AND THIRTEEN COMPANION CASES)

Before! MEDINA and HINCKS, Circuit Judges, and LEIBELL, District Judge

HINCKS, Circuit Judge:

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U.S.C.A., App. § 1735, et seq., and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions

of the Act, exacted from them too great a percentage of the profits and these actions were brought under the Suits in Admiralty Act, 46 U.S.C.A. 741 et seq., to recover the illegally collected amounts. The foregoing cause of action is asserted in each of the libels. In several of the cases some payments were made by the shippers after redelivery of the ships and within two years of the filing of the libel. And some of the libelants sought to obtain refund of certain alleged overchanges caused by the Commission's refusal to allow certain expense deductions and its refusal to permit cumulative accounting under certain circumstances.

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two year limitation of the Suits in Admiralty Act, 46 U.S.C.A. § 745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to as commencement of suit. We append to this opinion a chart showing the dates pleaded in the libels and, in some cases, in the Government's exceptive allegations. Since the dates in the exceptive allegations were not challenged, we accept them as true.

Judge Primieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the

A few of the libels alleged disputes as to the valuation of specific items entering into the cost basis upon which the profits were calculated. These included differences concerning the amount of "capital necessarily employed," the "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

actions were time-barred. Judge Herlands, in a memorandum opinion set out in the margin, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because jurisdiction was lacking.

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann,

"NOVEMBER 5, 1956.

"MEMORANDUM

"Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Governmentowned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

"Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U.S.C.A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel."

"Respondent's exception is sustained; Tibel dismissed. Libel-

arit's application for leave to amend is deried.

"The points now at issue before the Court have been too well-settled by recent authoritative decisions as to require consideration de nove. Sword Line v. United States, 328 F. 2d 344 (C.A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U.S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; American Eastern Corp. v. United States, 133 F. Supp. 11 (S.D.N.Y. 1955), aff'd 231 F. 2d 664 (C.A. 2 1956), cert. denied 351 U.S. 983 (1956); A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58 (S.D.N.Y. 1956). The Court has read the briefs in the three cited cases, and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

"Settle order on notice.

"WILLIAM B. HERLANDS,
"United States District Judge."

Wright & Pugh appeal. Dichmann, in its reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U.S.C.A. & 1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U.S.C.A. § 2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956-more than 15 days later. The appeal therefore is too late, and must be dismissed. The Fanny D (Eggers v. Southern Steamship Co.), 5 Cir., 112 F. 2d 347, cert. den. 311 U.S. 680; Blaske v. Dick, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute charter vessels owned by the Government. The statute, 50 U.S.C.A. App. §1735 et seq., provided for rental rates in \$1738, which incorporated by reference § 709(a) of the Merchant Marine Act, 46 *U.S.C.A. § 1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that § 709(a) merely set a minimum additional charter bire, proceeded to charter its ships pursuant to charters which provided a sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10% return. The libelants, as charterers, agreed to progressive rates which allowed the

Commission to recapture 90% of the profits in excess of \$300 per day, per vessel, above the 10% return, and

made payments accordingly.

However, the libelants objected to the sliding scale rate as illegal before making payment thereunder and obtained from the Maritime Commission the assurance that payments of charter hire were to be deemed preliminary and subject to adjustment until final audit. In recognition of this the Commission inserted Clause 13 in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. To support this, they point to Commission regulations, 46 CFR §§ 299.31(k)(1), 299.37-2(a) (1), (2) and (b)(3), to instructions such as the one set out in the margin, and to the Commis-

[&]quot;Clause 13. Additional Charter Hire. * * *

[&]quot;The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

[&]quot;Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon

sion's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U.S.C.A. App. § 1745(d).

The libelants argue that cause of action for return of charter hire illegally exacted accured as of the date of final audit, or—at the earliest—when the last payment or credit entry in their account with the Commission was made. In all cases this would avoid the time bar. The Government contends that the statute commenced running as of the date when each libelant redelivered the chartered vessels to the Commission. If this be so, these libels would be time-barred.

We agree with the judges below that the basic issues in this appeal were decided adversely to the appellants in our decision in Sword Line v. United States, 2 Cir., 228 F. 2d 344, aff'd on petition for rehearing 230 F. 2d 75, aff'd as to jurisdiction 351 U.S. 976, and in American Eastern Corp. v. United States, 133 F. Supp. 11, aff'd 2 Cir., 231 F. 2d 664, cert. den. 351 U.S. 983.

The Sword Line case held that a cause of action, such as that presented in these appeals, accures as of the redelivery date. See 228 F. 2d 344, 347; 230 F. 2d 75, 76. In so holding, the majority in that case carefully considered and explicitly rejected the argument that the effect of Charter Clause 13 was to delay the commencement of the running of the statute until

the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or therwise." (May 14, 1951 letter from Maritime.)

final audit. This was also the holding in American

Eastern, supra, 133 F. Supp. at page 15.

To avoid the impact of these decisions, the appellants have restated their theories but even as restated most of them were presented and rejected in Sword Line and American Eastern. The "mutual account" or "open account" theory as advanced by Judge L. Hand was rejected by his colleagues in Sword Line, 228 F. 2d at 347, and by the court in American Eastern, 133 F. Supp. at page 15. Nor were the preliminary charter hire payments a "trust fund" because they were kept in a special account. argument was forcefully brought to the court's attention in the American Eastern appeal by a letter from appellants' counsel which thoroughly discussed the point and cited the court to Rosenman v. United States, 323 U.S. 658. In its petition for rehearing in Sword Line, the appellant made essentially the same arugment but in somewhat more general terms.

There remains the contention, forcefully urged by those appellants to whom it is available, that, even if suits for refund of payments made prior to redelivery of the ships are time-barred, the court had jurisdiction over those libels which demanded refund of postredelivery payments to the Commission which were made within two years of the filing of the libel. libels so situated, see the Appendix hereto.) Government replies that the libelants cannot now demand refund since such payments were voluntary, citing Railroad Co. v. Commissioners, 98 V.S. 541, and Cunard S.S. Co. v. Elting, 2 Cir., 97 F. 2d 373, and that, in any event, since the libelants accepted the ships on the Commission's terms, they are now estopped from disputing them, citing Commissioner, of Internal Rev. v. National Lead Co., 2 Cir., 230 F. 2d 161, aff'd on other grounds 352 U.S. 313.

This point was unmistakably presented and was disposed of without discussion by another panel of this court in Sword Line in an opinion which did not explain why the court lacked jurisdiction of the claim for recovery of the post-redelivery payments. However, the rationale of the opinion in that case which was equally applicable to payments made before and after redelivery, and the rationale of American Eastern, required the orders of dismissal now before us on review. Indeed, in its briefs and its petition for rehearing in Sword Line, the libelant pointed out that after redelivery and within two years prior to the libel it had paid to the Commission \$660,000, which it contended was additional charter hire. Yet the court held that there was no jurisdiction to entertain the claim.

Apparently the only point now pressed which was not determined in Sword Line or American Eastern was raised in the Blidberg libel. This concerned a claim for expenses incurred in repairing latent defects which existed when the ships were received by Blidberg. But this claim was obviously in existence, at the very latest, when the ships were redelivered. Since the libels were not filed within two years of the redelivery these claims are barred. 46 U.SC.A. § 745.

If the subject-matter of these appeals were res nova, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the court. On the authority of Sword Line and American Eastern we hold that these libels also were barred.

Accordingly, the decrees appealed from are affirmed except the Dichmann, Wright & Pugh, Inc. appeal which is dismissed.

Name of Labelant
NS/8 /01,

This covers only first cause of action.

i Information obtained from exceptive allegations.

* Setoff; not actual payment.

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2.- Opinion of the Court of Appeals on Rehearing En Banc

(Decided July 28, 1958)

[Caption Omitted]

Before: CLARK, Chief Judge, MEDINA, HINCKS, WATERMAN and Moore, Circuit Judges

HINCKS. Circuit Judge:

Pursuant to libelants' petitions after the filing of our first opinion in this case, this court on December 19, 1957 granted rehearing en banc' which was limited to the question of determining the proper commencement date of the two-year statute of limitations of the Suits in Admiralty Act, 46 U.S.C.A. § 745. Our earlier (unreported) opinion is hereby withdrawn.

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U.S.C.A. App. § 1735 et seq., and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, insisted on including in the standard charter provisions calling for excessive additional charter hire and these actions were brought under the Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq., to recover such excess.

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U.S.C.A. § 745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commis-

Judge Lumbard has not participated in this appeal.

sion, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit.

Judge Palmieri, in an opinion reported at 141 F. Suppl 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River, Navigation Co., and denied leave to amend because, however pleaded, the actions were timebarred. Judge Herlands, in an unreported memorandum opinion, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because, for failure of timely institution of the actions, jurisdiction was lacking.

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its original reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was anterlocutory. It cited 28 U.S.C.A. § 12 express statutory authority for us to entermin this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U.S.C.A \$ 2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956. appeal therefore is too late, and must be dismissed. The Fanny D (Eggers v. Southern Steamship Co.), 5 Cir.; 112 F. 2d 347, certiorari denied 311 U.S. 680; Blaske v. Dick, 7 Cir., 126 F. 2d 96, 98.

² This action was required under the holdings of prior decisions of this court which will be discussed in this opinion.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government, The statute, 50 U.S.C.A. App. § 1735 et seq., provided for rental rates in § 1738, which incorporated by reference § 709(a) of the Merchant Marine Act. 46 U.S.C.A. § 1199(a). This latter section provided that Every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire onehalf of the profits in excess of a 10% return of employed capital. The Commission, claiming that § 709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters. Clause 13 of which provided a sliding scale for

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of \$100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$100 per day but

^{3 &}quot;CLAUSE 13. Additional Charter Hire.—If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within 30 days after the end of such year or. other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in ant calculation of cumulative net profit in any subsequent year or period):

the additional charter hire depending on the amount of profit per day in excess of the 10% return. Under these progressive rates the Commission was allowed to recapture as much as 90% of the profits in excess of \$300 per day, per vessel, above the 10% return.

However, the libelants claim that before entering into such charters and before making payments thereunder they objected to the sliding scale rates as contrary to § 709(a) and hence illegal; that by reason of their objections the Maritime Commission assured them that payments of additional charter hire would be deemed preliminary and subject to adjustment until final audit; and that, as a result of this understanding the final paragraph of Clause 13 was inserted in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. In support of this position, they point to Commission regulations, 46 CFR § 299.31

not in excess of \$300 per day-75% on such excess over \$100 per day.

[&]quot;Cumulative cet voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of \$300 per day—90% on such excess over \$300 per day.

[&]quot;The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

(k) (1), 299.37-2(a) (1), (2) and (b) (3), to instructions such as the one set out in the margin, and to the Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U.S.C.A. App. § 1745(d).

The Government now contends that Clause 13 of the charter is irrelevant to the limitations question and that the statute, of necessity, began to run on the date of payment with the result that all of the libels herein . involving payments made before the date of redelivery are time-barred. The Government also argues that jurisdiction as lacking over libels for recovery of payments made after redelivery even if made within two years of suit because such payments as a matter of law were "voluntary" within the meaning of Railroad Co. v. Commissioners, 98 U.S. 541; Chnard S.S. Co. v. Elting, 2 Cir., 97 F. 2d 373. Since these contentions have been raised by exceptive allegations the Government, in reliance on comment in The Ira M. Hedges, 218 U.S. 264, 270, is contending that the voluntary character of the payments, for which recovery is

[&]quot;Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

sought, deprives the court of jurisdiction. The libelants, on the other hand, have placed their reliance on Clause 13, and maintain that under that clause no breach of contract could possibly have occurred until, after "final audit," the Government refused to refund moneys claimed to be due the libelants. In the alternative, the libelants urge recovery on a mutual accounts theory according to which the statute of limitations would begin to run from the date of the last payment or credit entry in the account.

'The issues before us have been presented to this court twice before, although in not such comprehensive and forthright manner as in the present case. In Sword Line v. United States, 2 Cir., 228 F. 2d 344. and in the opinion therein on rehearing, 230 F. 2d 75, affirmed on other grounds 351 U.S. 976,6 the limitations issue, which had not been raised in the district court, was presented on appeal for the first time by the United States as appellee. This issue was one of three complex issues raised in the case. The court was in agreement in holding that the libelant's action had no merit because barred by a bankruptcy composition, but on the issue of limitations the majority. as pointed out on rehearing held that the action accrued upon the date of the payment for which recovery was sought. 230 F. 2d at page 76. Judge Hand's mutual accounts approach was rejected. In American-Eastern Corp. v. United States, 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, vertiorari denied 351 U.S. 983, we relied upon the Sword Line ruling and affirmed the lower court without opinion!

⁵ For purposes of this opinion it is not necessary to pass upon this contention. We observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional.

As to the timeliness of the libels, certiorari was denied.

The panel of this court which delivered the original opinion on these appeals—the opinion now withdrawn—felt unwilling to depart from the authority of those cases. But now that the court on rehearing has undertaken to proceed en banc, we feel under somewhat less constraint from our past decisions and consider anew, on the intrinsic merits, the issues now before us.

We have come to the conclusion that the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13. This is not the case, frequently occurring, in which money has been collected by the Government by virtue of a statutory direction. The statute involved in this case does not of itself authorize or require payments to the Government. Title 46 U.S.C.A. § 1199(a) declares, "every charter made by the Commission * * * shall provide * * * " Therefore, unless the parties enter into a charter there can be no liability created under § 1199(a). Accordingly, we must look to the charter and specifically to Clause 13 if we are to ascertain the rights and liabilities of the parties and evaluate the libelants' contentions that the Commission breached the charter and that the breach occurred not until it failed to return funds to the libelants after final audit and due demand.

When the libelants raised their contentions below, and in earlier cases, the Government's position was that Clause 13 was entirely irrelevant. Consequently, the Government never attacked the libelants' asserted interpretation of that clause: it filed no answers and its exceptive allegations raised no issues of fact. On this rehearing, however, for the first time the Government argues that even if Clause 13 is controlling on the limitations issue the libelants are misinterpreting the language of that clause: it now for the

first time suggests that "each final audit" in Clause 13 means each annual audit. But this dispute as to interpretation is plainly one that now appears to involve questions of fact on which extrinsic evidence is admissible. The parties never had occasion to present such evidence. And the particular problem of interpretation has never been passed upon by any judge in these cases or in any other that has been brought to our attention.

As to the interpretation of Clause 13 and its effect upon claims for the recovery of additional charter hire, we have been presented on appeal with many arguments based on facts alleged in briefs and affidavits, some but not all of which were part of the record below. But since the issue was not raised below, probably because the Government thought it irrelevant under the Sword Line decision, we think the cases should be remaided and the issue should be submitted to the trial judges for findings and determination after giving the Government opportumity to raise such issues of fact as may be desired. This is a case in which parol evidence is admissible on the disputed issue as to interpretation of the charters, Corbin on Contracts, Vol. 3, § 579, and we think we should wait until the relevant record of fact below has been made and completed before we commit the court to any particular interpretation. Our preview, on this appeal, of the contentions of the parties as to Clause 13 leads us to suggest that issues framed thereby are peculiarly appropriate for determination on such evidence as the parties may offer rather than on affidavits. Pacific-Atlantic Steamship Company v. United States, D. Del. 1955, 127 F. Supp. 931. Of course the burden of proving jurisdiction remains throughout on the libelants. Corporation of The Royal Exchange Assurance v. United States, 2- Cir.,

75 F. 2d 478. But we think the text of Clause 13 is an adequate, prima facie, showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect.

The true intent of Clause 13 having been ascertained, it can then readily be determined whether these suits in so far as they seek recovery of additional charter hire have been brought within the two-year limitation. And any suit thus found to have been timely brought should then, of course, be heard and decided on the merits.

Certain of the libels also include claims not directly based upon the asserted illegality of the progressive rate of additional charter hire under Clause 13. Thus, it is alleged that the Commission, for accounting purposes, improperly split the year 1947 into two segments which had the effect of unduly increasing the libelants' charter hire hability. The Commission's construction of the cumulative accounting provision is also asserted to have improperly increased the libelants' charter hire liability. One libelant asserts that the phrase "capital necessarily employed" as used in Clause 13 has been incorrectly determined with the result that its charter hire liability has been overstated. Another libelant asserts that the Commission improperly reduced its overhead expense, thereby increasing its charter hire liability, by offsetting certain management fees it had received and by refusing inclusion of certain post redelivery overhead expenses in "the charterer's fair and reasonable overhead expenses applicable to operation of the vessels" as provided in the first paragraph of Clause 13. Two libelants contend that their charter hire liabilities were improperly increased by the refusal of the Commission to allow the inclusion of certain expenses for agency fees in the

overhead expense figure envisioned by the extract from Clause 13 just above quoted. Every one of these claims relates solely to the proper computation of additional charter hire and has no independent basis. We hold that these claims should be dealt with in the same manner as the basic claim for recovery of excessive charter hire. For all were reserved by Clause 13 until "final audit" whatever that term shall be determined to mean.

A different situation, however, prevails with regard to Blidberg's claim for refund of expenditures for latent defects existing at the time the vessels were delivered on charter as contained in its sixth cause of libel. Such a claim does not come within the express provision of Clause 13 which reserves disputes concerning "additional charter hire." The accrual of this claim, therefore, was not deferred until the final audit and consequently it is time-barred. Isthmian Steamship Co. v. United States, D.C.S.D.N.Y., 146 F. Supp. 219. Alcoa Steamship Co. v. United States, D.C.S.D. N.Y., 94 F. Supp. 400 However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additionar charge mine even though direct recovery of the expense be time-barred.

To the extent that Sword Line and American-Eastern are inconsistent with rulings indicated above, they are overruled.

The appeal of Dichmann, Wright & Pugh, Inc. is dismissed. All other decrees appealed from are reversed and the suits are remanded for further proceedings in accordance with this opinion, except that the dismissal of Blidberg's sixth cause of libel is affirmed.

WATERMAN, Circuit Judge (dissenting):

I concur with the majority that the purported appeal in No. 24283, Dichmann, Wright & Pugh, Inc. v. United States should be dismissed for lack of appel-

late jurisdiction.

With respect to the issues relative to jurisdiction that the majority find to have been raised in the other thirteen cases and which in their judgment require remand to resolve, I concur in the dissenting opinion of Judge Clark. I would hold, with him, that the respective written instruments in each case, all of which contain the identical Clause 13, need no further judicial consideration below to make them properly interpretable; and that the interpretation placed upon these charter-parties in his dissent is a proper and justifiable one. I believe we should decide now, without more, whether these cases, case by case, are so time-barred as to deprive the courts of any jurisdiction over the respective alleged causes of action, and in the course of so doing I would follow our previous holdings in Sword Line, Inc. v. United States, 228 F. 2d 344 (2 Cir. 1955), affirmed on rehearing, 280 F. 2d 75 (2 Cir. 1956), affirmed, 351 U.S. 976 (1956), and in American Eastern Corp v. United States, 231 F. 2d 664 (2 Cir. 1956), cert. denied, 351 U.S. 983 (1956). When the libels were dismissed below for lack of jurisdiction libelants moved to amend the dismissed libels in order to present additional grounds to justify the taking of jurisdiction. See A. H. Bull S.S. Co. et al. v. United States, 141 F. Supp. 58, 59-60. Not only were the libels severally dismissed below, but the motions to amend were severally denied; and appeals from the dismissals and the denials of the motions. to amend were then taken. What is gained by not taking up these rulings now? Since it is my belief that the rulings below in these thirteen cases were

in all respects proper, I would affirm the decisions of Judges Palmieri and Herlands below.

CLARK, Chief Judge (dissenting):

Despite many years on the bench I have still to find an acceptable formula for appellate disposition of a case where the adjudication below gives concern, but falls short of clearly demonstrable error. Of this at least I do feel sure, that a court of review should not attempt to relieve itself of responsibility—get itself off the hook—by merely remanding, i.e., passing the buck back, to the trial court. It should remand only when it has a clear concept of what the trial judge, can do to advance the case to final adjudication and precisely states that for his benefit and the benefit of the litigants thus subjected to 'tantalizing delay.

These basic requirements seem to me quite unfulfilled in the decision herewith. The mandate is merely for remand "for further proceedings in accordance with this opinion." The opinion proper has some further vague suggestions or directions for the "framing" of issues-apparently many of them-and for the taking of testimony—evidently extensive and unlimited—as to each. But the opinion itself demonstrates by the controlling force it gives to Clause 13 of the charters that there is really but a single issue, namely, the interpretation of a written instrument. And on this the record is already complete and the case ripe for final ruling. More precisely stated the issue is whether Clause 13 can be interpreted to control and set aside the normal rule-relied on in our earlier rulings on the issue !- that on a quasi-

¹ Sword Line, Inc., v. United States, 2 Cir., 228 F. 2d 344, affirmed on rehearing 230 F. 2d 75, affirmed 351 U.S. 976;

contractural claim for refund of payments asserted to have been erroneously made the right of action accrues and the period of limitation begins to run from the time of the payments. Indeed, the whole tenor of the decision seems to be that, since limitation restrictions are harsh, we must search assiduously—and ask for trial court help thereto—for means to interpret a contract of seemingly different purport to achieve that end. In taking this rather unusual course my brothers give short shrift to the views of many district judges and of two different panels of this court, whose adjudications the Supreme Court brefused to disturb. I think the explanation proffered is inadequate for its task.

To understand what is happening we must consider the state of the existing record before remand. What we are dealing with is a "built-in" statute of limitation forming a very direct boundary to the grant of remedy against the sovereign. 46 U.S.C. 745. This is important in several ways. It shows the strong legislative policy against stale claims against the government. It clearly places the burden of proof upon the claimants to show that they properly come within an unrestricted class. And since it thus vitally delimits the court's jurisdiction, it makes appropriate and normal the usual processes for the testing of issues of federal jurisdiction, as actually had here, namely, motion and affidavit. In short it was incum-

American Eastern Corp v. United States, D.C.S.D.N.Y., 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U.S. 983.

² Land v. Dollar, 330 U.S. 731, 735; KVOKAInc. v. Associated Press, 299 U.S. 269, 278; Central Mexico Light & Power Co. v. Munch, 2 Cir., 116 F. 2d 8; Williams v. Minnesota Min. & Mfg. Co., D.C.S.D. Cal., 14 F.R.D. 1; Ramirez & Ferand Chili-Co. v. Las Palmas Food Co., D.C.S.D. Cal., 146 F. Supp. 594, 597, affirmed Las Palmas Kood Co. v. Ramirez & Ferand Chili

bent upon the libelants to demonstrate by their affidavits that their libels were timely or, as applied to the issue here, that the negotiations for and background of the charters showed the correct interpretation of Clause 13 to be one for extending the time of suit. And this they attempted with at least a wealth of material, however pertinent it may be thought to be.

It is, indeed, a reflection upon able and shrewd counsel to believe that, faced with the legal requirement and practical necessity of disclosure, they should have held back relevant and convincing material. One of the more confusing aspects of the decision is that it is not clear how far it is intended to repudiate the normal procedure for testing issues of federal jurisdiction as shown by the cases cited in my footnote 2 supra. In any event we cannot expect miracles of counsel; anything more they bring to a new trial will be only cumulative to what is already before us. Obviously were there oral evidence of direct statements of intent on the part of the negotiators now presently rememberd (none has been suggested), such evidence could not be used to control or vary the written document. All the material useful for decision is actually at hand; I do not see why my brothers do not employ it for final adjudication that jurisdiction exists if such is the way they feel they must go. The obstacles will not be any the less after two or three more years of protracted litigation.

That this is their direction is, I think, to be fairly deduced from the opinion, even though the discussion therein is limited. Not only does it accept the text

Co., 9 Cir., 245 F. 2d 874, certiorari denied 355 U.S. 927; and see full discussions in 6 Moore's Federal Practice ¶ 56.03, pp. 2027, 2028 (2d Ed. 1953), also 5 id. ¶ 38.36, pp. 290–292 (2d Ed. 1951), 2 id. ¶ 12.09, pp. 2248–2250, 2256, ¶ 12.14 (2d Ed. 1948).

of Clause 13 as "an adequate, prima facie, showing of jurisdiction," but it takes the highly drastic and quite confusing course of overruling out of hand our two previous rulings to the contrary cited in my note 1 supra. What reason is there for overruling Sword Line and American Eastern if eventually they may be held correctly decided? Indeed, in the present state of division in the court, what reason or effect is there to this declaration in any event?

Let us look more closely at this "prima facie" ruling. In interpreting the writing we must start with the congressional policy disfavoring stale claims. I see no reason here for exceptional treatment. The contracts were made, the services performed, and the payments made a decade or more ago. And what is more, the ships were actually returned to the government, thus entirely closing the transactions, almost a decade ago. It is especially strange, if these were live issues where the government was expected to make vast refunds, that some of the rental payments were actually made after the ships were returned.4 One can understand belated payments by the charterers if they thought the hire was actually due, but hardly if they were preparing to claim that there had already been gross overpayment. If ever stale claims against the government are to be viewed with a jaundiced eye, these would seem to be the occasion.

Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment: nor does it in any way

³ It is made by a minority only of the active judges, against the expressed view of other judges who may ultimately prevail. An overruling so deficiently based can only mislead the unwary.

^{&#}x27;Some of the payments were actually made within the twoyear limitation; while these are not separately noted in the opinion, they seem barred as voluntary payments.

suggest that it was meant to deal with the processing of claims for refund. Clearly it is what it is labeled as being, namely, a provision for "Additional Charter Hire." It follows naturally after Clause 12, covering "Basic Charter Hire," and in its main section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any calendar year. The emiliasis on yearly accountings is obvious. The particular provisions here in issue come at the end and deal with preliminary and final payments of such additional charter hire, based on the scale stated. So a method is provided whereby the government can ask and receive preliminary payments as the money is earned, and the "final audits" clearly refer to the yearly settlements thus made necessary. Quite simply they are necessary because the progressive rate of additional hire depends on the amount of cumulative profits for the year. They just do not fit the concept of an ultimate and probably long delayed settlement of all disputes which might conceivably arise under any of the manifold provisions of these extensive charters. Significantly a much later charter provision does look to such possibility, thereby affording a persuasive contrast. For Clause 28 deals with "Accounting. Report and Supervision" and requires the keeping of books, the filing of financial statements, and the like, covering all transactions, while it also authorizes the auditing of all books and the maintenance of checks and controls of expenditures and revenues in connection with the operation of any of the chartered vessels.

In the final paragraph of Clause 13 the preliminary statements therein referred to are correlated with the final audit. This places a well-nigh insuperable obstacle in the way of the interpretation claimed by libelants. For the "adjustment" visualized is to be

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had "either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner"; the idea is carred further thus, "at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." Each final audit therefore serves a function of settling the payments due on each calendar year's profits. Thus it fits properly with the rest of the clause. It cannot be made to mean some final settlement of all and sundry differences a decade or more hence when at length both parties are prepared to have a balance struck. Thus the government's brief is correct in saying: "Thus the charterers' right to file a claim for adjustment and refund of an overpayment of additional hire and to bring immediate suit if refund was not made is precisely the same at the time of a charterer's rendition of its preliminary accountings and at the time of the owner's final audit."

This natural construction is supported by various Maritime Administration regulations which (1) require the charterer at the end of each calendar month to pay 90 per cent of the additional charter hire then indicated to be due, 46 CFR 299.31(k)(1); (2) provide that such payments are preliminary and subject to adjustment upon completion of audit by the government covering the period involved (the calendar year), id.; (3) provide that tender of the monthly payments and their acceptance do not prejudice rights under the charter or otherwise, id.; (4) require remittance of monthly payments to be accompanied by a preliminary statement, 46 CFR 299.31(k)(2); (5) provide that if this statement indicates that 90 per cent of the cumulative total for the expired portions of the periods involved (calendar year) is less than the total of payments theretofore made for the period, the charterer may apply for a refund, 46 CFR 299.31 (k)(5); and (6) require each charterer to submit a separate final accounting of additional charter hire for each annual or over-all accounting period [which under 46 CFR 299.37-1(h) and (i) is defined as a calendar year or a period less than a calendar year, 46 CFR 299.37-2(b)]. Hence, simply put, Clause 13, read with the regulations, provides that the charterers must make monthly payments on account of the additional charter hire which are preliminary because only upon the rendition of preliminary statements or upon final audit for the year will the parties know whether or not the amounts of the monthly payments were correct.

Neither in wording nor in practical operability, however, is the Clause appropriate for the adjustment of the type of "overpayment" bere involved. For the charterers knew that as they read the law the sums here claimed were not correct even when remitted. So there is no suggestion anywhere in the contract that the earlier language in Clause 13 bears on these "overpayments" in any way. Nor is there any suggestion in Clause 13 or in the regulations that the preliminary payments are tentative because the charterers believed the Clause to be illegal or that the parties agreed to put off a judicial determination of the legality of the rates. It is a strange contract which would preclude suit by the charterers to reform the contract or to recover the specific monthly "overpayments" if actually Hegal. But, as the opinion Merewith makes clear, libelants to succeed must rely on such an interpretation, viz., that the phrase "each final audit" can mean only some type of closing-out-accounting which ultimately and finally terminates all relations between the char-

. terers and the United States. I submit with all deference that the mere statement of the argument betrays its weakness; without fairly conclusive support somewhere for such a reading there is no "prima facie showing of jurisdiction." Surely the parties did not intend an agreement to require the deposits of huge sums of money for an indefinite time pending determination of the legality of the contract rates. For quite clearly the period of limitation can start only when the parties agree and are content that they have eventually obtained an ultimate closing-out accounting. Ironically enough, since even late deposits are to be included, there is nothing to prevent the charterers from continuing to make the government a good and safe depositary, paying better than market rates of interest, for their excess funds. Hence for my part I cannot accept this as permissible • interpretation against respondent's persuasive showing (wholly consistent with both the charters and the regulations) that "each final audit" means an audit of the charterers' yearly profits.

It is true that the libelants ably and ingeniously develop various arguments from the background material in an endeavor to combat this analysis. Doubtless they will fashion others if allowed to prolong the proceedings. But the very ingenuity exercised, viewed against the results achieved, suggests how pressing is their need for an argumentative support which they still find lacking. It hardly seems worth while now to discuss these arguments at length beyond a general suggestion of their weakness. They deal either with supposed inconsistencies with the government's present position, such as segregation of accounts or the like, or with claimed admissions by the Maritime officials. The principle against waiver of public rights by government officers would

make these dubious in any event; but even more important is the fact that the inconsistencies or waivers are apparent only to those predisposed to see them. They obviously did not occur to the officials at the time. Unconscious waiver of public rights

is not a legal principle to be pressed far.

The opinion states that the government for a considerable time concealed its present and ultimate contention. That charge, if important, does not seem to me to be sustained on the record. Appellants have vacillated in the theories they would rely upon, and seemingly have come to a choice of Clause 13 only recently. As the case developed there was not early occasion for the government to be more specific in its opposition (which has always been steady and continuous) than it has been. And its position has been reasonably well known, as was apparent in the earlier cases before us. So Judge Walsh, ably analyzing these points in the trial court in the American Eastern case, D.C. S.D. N.Y., 133 F. Supp. 11, 16 (cited in note 1 supra), well concludes:

The labyrinthine aspects of the charter and regulations which libelant bas seen fit to exaggerate are really only superficial. They are to be expected in any administrative attempt to deal with a complex subject matter on a mass scale. Care must be taken not to permit their seeming complexity to confuse the elementary simplicity of the dealings between the parties.

In any event the point cannot be of controlling importance, since we have now come quite completely to the point where we enforce justice and the law, notwithstanding possible deficiencies in presentation by the lawyers.

⁵ See e.g., United States v. Bess, 78 S. Ct. 1054; Trop v. Dulles, 356 U.S. 86, reversing 2 Cir., 239 F. 2d 527; Vibra Brush Corp. v. Schaffer, 2 Cir., May 13, 1958; Columbia Research

Consequently I must conclude that the procedure here does not require, but indeed makes anomalous, any further trial or delay in adjudication. The case is ripe for final settlement, which should now be had. of the jurisdiction issue. And any termination which does not follow the simple course stated in Sword Line and applied in American Eastern runs into serious difficulties, as resting upon a strained interpretation of a written instrument. Here some note should be taken of our procedure. These cases were originally argued on January 15, 1957. The process of decision, particularly the rehearing in banc, has delayed action now for a year and a half, and the end is of course not yet in sight. I fear nothing has been · achieved by the delay but the accentuation of our differences, with no progress toward their adjustment. Had the case been terminated by February 1957 by decision of the original panel; with a concise statement of our disagreement-a matter of interest, which the public is entitled to know-but without attempting the supposed, though illusory, reconciliation of views to be obtained by a hearing in banc, every one, it seems, would have profited.

Hence I would affirm the decisions reached below by able district judges in accordance with views heretofore expressed by this court. I should add that of course I do not object to the dispositions made of certain libels not presenting the main issue, But as to this issue, since there would seem a distinct possibility of its going higher—in view of its great importance involving, inter alia, the premature and undefined

Corp. v. Schaffer, 2 Cir., May 13, 1958; Joint Council Diving Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., 2 Cir., 157 F. 2d 417, 420; Massachusetts Bonding & Ins. Co. v. State of New York, 2 Cir., July 11, 1958.

overruling of previously settled precedents-I do feel an obligation to mention the further question here definitely presented as to the effect of a vote by a judge retired from regular active service under 28 U.S.C. § 371(b) upon an appear which has been ordered heard in banc. The question arises because the governing statute 28 U.S.C. § 46(c) says: "A court in banc shall consist of all active circuit judges of the circuit"; and Judge Medina, whose vote is here decisive, took advantage of the retirement provisions of 28 U.S.C. § 371(b) on March 1 last. I do not like to raise the question (which obviously can be settled only by the Supreme Court or by corrective legislation) because I have been active in inducing retired colleagues to sit and because I regard their continued participation in cases committed to their consideration desirable and beneficial all around. And I think this conclusion also applies to retired District Judge Leibell, who sat on the original panel herein which voted for affirmance. But the matter has caused doubt and uncertainty in other cases we have had, and a definitive answer is urgently desirable.

3. Opinion of the Court of Appeals Denying Petition for Further Rehearing En Banc

(Decided March 26, 1959)

[Caption Omitted]

Before: Clark, Chief Judge, Medina, Hincks, Waterman and Moore, Circuit Judges

HINCKS, Circuit Judge:

The United States, as appellee, attacks the decision carried in our opinion of July 28, 1958, on the ground, inter alia, that Judge Medina, who concurred therein, by virtue of his retirement on March 1, 1958 was dis-

qualified under 28 U.S.C.A. § 46(c) from participating. We disagree.

It was on December 19, 1957, that we granted rehearing of our earlier decision before the court in The court in banc comprised Chief Judge Clark, Judges Medina, Hincks, Waterman and Moore, all then active circuit judges. Judge Lumbard declined to sit with the court on the ground that he was disqualified by reason of earlier contacts with the cases below when serving as United States Attorney. The court in bane when thus constituted conformed in all respects to 28 U.S.C.A. § 46(c) which provides: "A court in banc shall consist of all active judges of the circuit." Since Judge Medina was a member of the court in banc which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once constituted according to law, whether in banc or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed. As the Reviser's note indicates, § 46 was included in the Code of 1948 to preserve the interpretation established by Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 314 U.S. 326, that notwithstanding the three-judge provision of § 212 of Title 28 U.S.C., 1940 Ed., a court of appeals might lawfully consist of a greater number of judges sitting in banc. Nothing in Textile Mills nor the Code provisions which preserve its interpretation suggests that retirement under 28 U.S.C.A. § 371 operates to terminate the power of the retiring judge as a member of the court in banc to participate in the decision of a case formerly assigned to the court but as yet undecided. We have found no reported case which so holds. We think the case of Commercial National Bank in Shreveport v. Connolly, 5 Cir., 177 F. 2d 514, supports our conclusion that the competence of a judge who is once duly constituted a member of a court in banc, may survive his retirement. There Judge Sibley who as an active member of the Fifth Circuit Court of Appeals had participated in the decision of a case heard in banc, thereafter retired (on October 1, 1949) and subsequently cast the decisive vote for an order (filed November 16, 1949) denying a petition for rehearing which had been made to the court in banc.

Moreover, § 43(b) of the Code of 1948 provides: "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." This provision is not stated to be exclusive of the "judges designated or assigned" to hear and determine a case as member of a court in banc. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in § 46(b) and to judges designated and assigned under §§ 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a nember of the court in banc was competent even after his retirement to sit under && 43(b). 294(b) and 296.

The other claims of error raised in the petition we think unfounded. They involve matters already carefully considered by us. And the requested clarifications we think unnecessary and inappropriate. We have reversed and remanded for a determination of jurisdiction and, if jurisdiction be sustained, of the merits. We have made it plain that these determinations should be made without constraint by Sword Line v. United States, 2 Cir., 228 F. 2d 344, and American Eastern Corp. v. United States, 2 Cir., 231 F. 2d 664, and of course in conformity with our opinion of July 28, 1958. The questions now put to us are questions for answer by the parties and the trial court.

Petition denied.

Separate statement of CLARK, Chief Judge, and WATERMAN, Circuit Judge:

Judge Hincks' opinion herewith demonstrates both. the difficulty and the impracticability of interpreting the governing statute, 28 U.S.C. § 46(c), otherwise than by giving the word "determined" its normal meaning of "decided," and the word "active" its natural force of "non-retired." This view is underlined by the contrast drawn between judges "in active service" and "retired" judges, even though designated to sit, in the several statutes such as 28 U.S.C. & 294(b) and (d). 295, 296, and 371(b). It appears to be the general conclusion of other circuits. In re Sawyer, 9 Cir., 260 F. 2d 189, 203, n. 17, certificari granted 358 U.S. 892; G. H. Miller & Co. v. United States, 7 Cir., 260 F. 2d 286, 305; United States v. Gordon, 7 Cir., 253 F. 2d 177, 185, 191, 194; see also United States v. Sentinel Fire Ins. Co., 5 Cir., 178 F. 2d 217, 239, and Commercial Nat. Bank in Shreveport v. Connolly, 5 Cir., 177 F. 2d 514, interpreted in the light of Fifth Circuit Rule 29 stating the vote required for a rehearing. And it has been the uniform practice of our own elder colleagues. Reardon v. California Tanker Co., 2 Cir., 260 F. 2d 369, 375, 376, certiorari denied

California Tanker Co. v. Reardon, S. Ct., March 2, 1959: United States v. Silverman, 2 Cir., 248 F. 2d 671, 696, certiorari denied 355 U.S. 942: Harmar Drive-In Theatre v. Warner Bros. Pictures, 2 Cir., 241 F. 2d 937, certiorari denied 355 U.S. 824. Moreover, it is necessary if the obviously indicated policy that the active circuit judges shall determine the major doctrinal trends of the future for their court is not to be flouted by the freezing in of a particular grouping of judges for months (as here) or even for years. And so notwithstanding some personal regret and even doubt as to the ultimate wisdom of the policy, it must be held that the decision of July 28, 1958, purporting to reverse the decrees below is ineffective and void for lack of a valid majority vote and those decrees under consideration here must stand affirmed by an equally divided court. People v. Bork. 96 N.Y. 188, 199; Watson v. Payne, 94 Vt. 299, 111 A. 462,

4. Judgment of the Court of Appeals

United/States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-eighth day of July one thousand nine hundred and fifty-eight.

Present: Hon. CHARLES E. CLARK, Chief Judge; Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. STERRY R. WATERMAN, Hon./LEONARD P. MOORE,

Circuit Judges.

AMERICAN FOREIGN STEAMSHIP CORPORATION, LIBELANT-

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and action remanded for further proceeding in accordance with the opinion of this court, dated July 28, 1958, with costs to the appellant.

A. Daniel Fusaro, Clerk.

5. Order of March 26, 1959, Denying Petition for Further Rehearing En Banc

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-sixth day of March, one thousand nine hundred and fifty-nine.

Present: Hon. CHARLES E. CLARK, Chief Judge; Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. STERRY R. WATERMAN, Hon. LEONARD P. MOORE, Circuit Judges.

AMERICAN FOREIGN STEAMSHIP CORPORATION, LIBELANT-APPELLANT

92.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

A. DANIEL FUSARO, Clerk.

Office Supreme Court, U.S.

FILED

AUG 19 1959

JAMES R. BROWNING, Clerk

IN THE

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Supreme Court of the United States .

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, Petitioner

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

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August, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, Petitioner

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York dated May 11, 1956 (R. 26a-29a) is reported as A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58. The opinion of the three-judge panel of the Court of Appeals dated September 25, 1957 (Pet. app. 14-22), the opinion of the Court of Appeals on rehearing in banc dated July 28,

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Is a circuit judge, who has been designated and assigned under 28 U.S.C. 46(c) as a member of a court of appeals in banc to hear and determine the issues in a case, competent under 28 U.S.C. 43 (b), 28 U.S.C. 46(c), 28 U.S.C. 296 and 28 U.S.C. 371 to participate in the court's in banc decision reached after his retirement from regular active service?

STATUTES INVOLVED

28 U.S.C. 43(b) provides:

"Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court."

28°U.S.C. 46(e) provides:

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in bane is ordered by a majority of the circuit judges of the circuit who are in active service. A court in bane shall consist of all active circuit judges of the circuit."

28 U.S.C. 296 provides:

"A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

"Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

28 U.S.C. 371 provides in pertinent part:

"Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise...He shall, during the remainder of his lifetime, continue to receive the salary of the office."

STATEMENT

1. Respondent's Cause of Action

Respondent is a steamship company which chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 in accordance with section 5 of the Merchant Ship Sales Act (50 U.S.C. App. 1738). Respondent is sning the Government under the Suits in Admiralty Act (46 U.S.C. 741 et seq.) because the Maritime Administration breached the Maritime Commission's agreement in clause 13 of the charter to refund certain excessive preliminary payments of so-called "additional charter hire" upon the completion of final audit of respondent's accounts. The facts material to the consideration of the question presented in the Government's petition are:

Respondent had chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 and returned the last of them in 1949. In September 1951 and September 1953, respondent made certain preliminary payments on account of additional charter hire to the Maritime Administration, successor to the Maritime Commission, under a specific agreement contained

¹ The chartering functions of the Maritime Commission were transferred to the Maritime Administration effective May 24, 1950 in accordance with Reorganization Plan No. 21 of 1950 (64 Stat. 1273, et seq.). See note set out under 46 U.S.C.A. 1111.

² Petitioner mistakenly asserts that respondent sued to recover an illegal exaction of payments of additional charter hire. (Pet. 3-4) As the court below held, the suit was for breach of the Maritime Commission's agreement in Clause 13 of the charter to return excessive preliminary payments deposited by respondent on account of additional charter hire. (Pet. app. 29-32)

³ The facts material to the substantive issues decided by the court below are set forth in the conditional cross-petition for a writ of certiorari filed herewith.

in Clause 13 of the charter that any overpayments would be refunded to it "upon final audit" of its accounts.

On October 21, 1954, respondent submitted its final accounting and demanded the refund of overpayments upon final audit of those accounts in accordance with the pertinent provisions of Clause 13 of the charter and the instuctions and regulations of the Maritime Administration. On November 3, 1954, the Maritime Administration refused to return such overpayments upon final audit in accordance with Clause 13, and on November 24, 1954 respondent sued in admiralty in the Southern District of New York for breach of that agreement.

Some, but not all, of the regulations and instructions of the Maritime Administration confirming this agreement are referred to in the in bane decision of the court below. See Pet. app. 26-27 and Fn. 4.

The pertinent provisions of Clause 13 are:

[&]quot;The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshippemiseout) charter (prior to the times of payment provided for above or in such Warshippemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." (R. 22a)

2. The Proceedings Below

The Government appeared specially and excepted to the jurisdiction of the district court on the ground that

"This [District] Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46. U.S.C. 745." (R. 19a)

and moved the exception for hearing (R. 57).

The exception was sustained and the libel dismissed on authority of Sword Line, Inc. v. United States, 228 F. 2d 344, aff'd on rehearing, 230 F. 2d 75, aff'd as to admiralty jurisdiction, 351 U.S. 976, and American Eastern Corp. v. United States, 133 F. Supp. 11, aff'd, 231 F. 2d 664. District Judge Palmieri said:

"The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests." (R. 26a-27a.)

The last of the chartered vessels had been redelivered on December 28, 1949 (R. 4a). The preliminary payments were made on September 21, 1951 and September 21, 1953 (R. 20a-21a). The district court therefore held that it lacked jurisdiction and dismissed the amended libel because it found that the payments were voluntarily made, an issue which was not before the

court on the Government's motion, which respondent did not know the court was entertaining, and concerning which respondent was given no opportunity to secure and present evidence. Cf. Washington ex rel. Orc. R. & N. Co. v. Fairchild, 224 U.S. 510, 526, and Morgan v. United States, 304 U.S. 18.

On appeal, a three-judge panel of the Court of Appeals, consisting of Circuit Judges Medina and Hincks, and District Judge Leibell, in an opinion written by Judge Hincks, affirmed on authority of Sword Line and American Eastern, although the court expressed doubts as to the correctness of those decisions. It said:

⁵ Rule 9(a) of the General Rules of United States District Courts for the Southern and Eastern Districts of New York provides that:

[&]quot;Notice of motion in all actions or proceedings shall be in the time and manner as provided in the Rules of Civil Procedure for the United States District Courts."

Rule 6(d) of the Federal Rules of Civil Procedure provides

[&]quot;A written motion other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing.

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides:

[&]quot;An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." (Emphasis supplied.)

Inasmuch as the Government's exception (R. 19a) and motion bringing the exception on for hearing (R. 57) went only to the question of whether the suit was timely brought so as to invest the district court with jurisdiction; issues going to the merits, such as voluntary payment, were not before the district court. Cf. McNichols v. Lennox Eurnace Co., 7 F.R.D. 40, 42 (N.D.N.Y. 1947); Metropolitan Life Ins. Co. v. Everett, 15 F.R.D. 498, 499 (S.D.N.Y. 1954).

"If the subject-matter of these appeals were res nova, we are by no means sure that our dispositions would coincide with those made by the majorary opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the court. On the authority of Sword Line and American Eastern we hold that these libels also were barred." (Pet. app. 21.)

Rehearing in banc was granted on December 19, 1957, and on rehearing, the majority of the court (Judges Hincks, Medina and Moore) in an opinion again written by Judge Hincks, reversed the district court and held that since the preliminary payments on account of additional charter hire were made pursuant to the charter agreement, and specifically Clause 13 thereof, the rights of the parties depended upon that clause. Clause 13 provided that upon the completion of final audit "overpayments would be refunded to the charterer as required." The Government, however, on rehearing contended for the first time (Pet. app. 29-30) that the words "final audit" in Clause 13. were used in the sense of "annual audit," and the court said that the Government should have an opportunity to plead and to prove that contention (Pet. app. 30). The court therefore held that all claims "were reserved by Clause 13 until 'final audit' whatever that term shall be determined to mean," (Pet. app. 32) and that the issue as to the sense in which "final audit" was used in Clause 13 "should be submitted to the trial judges for findings and determination after giving the Government opportunity to raise such issues of fact as may be desired," (Pet. app. 30)

The court did not pass upon the Government's contention that the preliminary payments were volun-

tary payments because it said this was an "issue going to the merits" and not germane to the question of jurisdiction. (Pet. app. 27-28, and fn. 5) Cf. Binderup & Pathe Exchange, 263 U.S. 291, 304-05. The court also overruled the Sword Line and American Eastern decisions to the extent that they were inconsistent with its decision.

Judges Clark and Waterman dissented in separate opinions. Judge Clark raised the question now presented in the Government's petition. He expressed doubt as to the authority of Judge Medina to participate in the court's decision because he had retired from regular active service after the case had been presented to the court in banc but before a decision had been reached.

The Government petitioned for further rehearing in banc principally on the ground that Judge Medina was disqualified from participating in the court's decision because of his retirement on March 1, 1958. The petition was denied, the court dividing as it had in deciding the case on rehearing in banc. The majority held that Judge Medina

"who under § 46(c) was designated and assigned as a member of the court in banc [prior to his retirement] was compétent even after his retirement to sit under §§ 43(b), 294(b) and 296." (Pet app. 46)

In a separate statement Judges Clark and Waterman expressed the view that 28 U.S.C. 46(c) prohibited. Judge Medina's, participation in the case after his

The bases of their dissents to the court's decision on the merits are discussed in the conditional cross-petition for a writ of certiorari filed herewith.

retirement from regular active service. Pet. app. 47-48)

On June 23, 1959, the Government filed its petition for a writ of certiorari. On July 1, 1959, the time of respondent to file its brief opposing issuance of the writ was extended by this Court until August 24, 1959.

ARGUMENT

The Government does not assert that the court below in its interlocutory judgment wrongly decided the issues before it. The question it presents in its petition is limited to whether Judge Medina was competent under the pertinent statutes to participate therein.

The petition should be denied for the following reasons: (1) The determination of the question presented will not affect the validity of the in bane decision, or in consequence, the rights of the parties in this case (Cf. Nashville C. & St. L. R. Co. v. Wallace, 288 U.S. 249, 259); (2) The question presented by the Government was correctly decided by the court below; (3) The practice in all other circuits in which the question has arisen conforms to that of the court below; and (4) The court below correctly decided the substantive issues before it.

I. The Determination of the Question Presented by the Government Will Not Affect the Validity of the In Banc Decision or, in Consequence, the Rights of the Parties in This Case

This is not a case where challenge is made to the propriety of action taken by a judge, as for example, his participating in an appeal from a case he heard as a trial judge (cf. American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U.S. 372, 387) or his holding a term of court in violation of the rules of the court (cf. Johnson v. Manhattan R. Co., 289, U.S. 479). The objection here is not to what Judge Medina did but to what he was. The Government here questions his status, i.e., whether he was the kind of circuit judge authorized by the judicial code to participate in the in bane decision. The validity of the in bane decision does not rest upon the determination of that question.

Judge Medina did not participate in the in banc decision as a mere usurper. He continued to hold the office of circuit judge of the Court of Appeals notwithstanding his retirement from regular active service. Booth v. United States, 291 U.S. 339, 350-51. He participated in the decision in gold faith under color of the authority of the office he held. He participated therein under his designation and assignment before retirement as a member of the court in bane to hear and determine this case, just as under color of the same authority and under kimilar designation and assignment before retirement he had participated, between the time of his retirement and the time of this decision, in decisions of 36 other cases (in 20 of which the Government was a party)7 which were pending in divisions of the Court of Appeals when he retired from regular active service.

A judge who continues in good faith to perform judicial functions after his statutory authority has expired is a de facto judge. Ball v. United States, 140 U.S. 118, 128-29; United States, v. Marachowsky, 213 F. 2d 235, 244-45 (7th Cir., 1954), cert. denied, 348 U.S. 826; Sylvia Lake Co. v. Northern Ore

⁷ These cases are listed in the appendix hereto, page 1a, post.

Co., 242 N.Y. 144 (1926), cert. denied, 273 U.S. 695; State 'ex rel. Jugler v. Grover, 102 Utah 459, 462, (1942). Cf. Waite C. City of Santa Cruž, 184 U.S. 302, 322-24.

So long is he is not restrained from performing judicial functions in a quo warrante proceeding to which he must be a party (Johnson v. Manhattan R. Co., 289 U.S.; at 502), his official acts are as binding upon litigants as those of a de jure judge.

.8 The principle that the acts of a de facto judge are as binding upon litigants as those of a de jure judge is said to be "recognized in all jurisdiction" Sylvia Lake Co. v. Northern Ore Co., 242 N.Y. 144, 147 (1926), cert. denied, 273 U.S. 695. Courts of Appeals in seven circuits have recognized it. Luhrig Collieries Co. v. Interstate Coal & Dock Co., 287 Fed. 711, 713 (2d Cir., 1923), cert. denied, 262 U.S. 751; Two Guys from Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 430, fn. 1 (3d Cir., 1959); Sharfsin v. United States, 265 Fed. 916, 917-18 (4th Cir., 1920); Sykes v. Sanford, 150 F. 2d 205 (5th Cir., 1945); United States v. Marachowsky, 213 R. 2d 235, 24 45 (7th Cir., 1954), cert, denied, 348 U.S. 826; Myris v. Ulited States, 19 F. 2d 131, 133 (8th Cir., 1927); Leary v. United States, decided May 18, 1959 (9th Cir. No. 15,290), not yet reported. Cases from twenty-two States, the then Territory of Hawaii, and Canada in which courts have applied or expressly approved the principle are. collected in 144 A.L.R. 1207 (1943).

The entire administration of justice is said to depend upon the preservation of this principle. "The supremacy of the law could not be maintained or its execution enforced if the acts of a judge having colorable but not a legal title were to be deemed invalid." Sylvia Leke Co. v. Northern Ore. Co., 242 N.Y., at 147. Litigants could not proceed in the courts with confidence if the authority of those in possession of judicial office could be challenged by the losing party. United States v. Alexander, 46 Fed. 728, 729 (D.C. Idaho, 1891). Judges could not perform their office if compelled to defend themselves from challenge by litigants. The judge "instead of trying the rights of parties, will be continually engaged in defending his own." Clark v. Commonwealth, 29 Pa. 129 (1858), cited with approval in Ball v. United States, 140 U.S., at 129 and Norton v. Shelby County, 118 U.S., at 447.

Ex Parte Ward, 173 U.S. 452; Ball v. United States, 140 U.S. 118 Manning v. Weeks, 139 U.S. 504. See also Norton v. Shelby County, 118 U.S. 425, 441; McDowell v. United States, 159 U.S. 596.

The validity of the in banc decision therefore does not depend on whether Judge Medina had statutory authority to participate therein, and the rights of the parties consequently will not be affected by the determination of the question presented in the Government's petition. Cf. Nashville, C. d. St. L. R. Co. v. Wallace, 228 U.S. 249, 259.

II. The Question Presented by the Government in the Petition Was Correctly Decided by the Court Below

The Government's argument that Judge Medina was not competent after his retirement to participate in the in banc decision rests upon Section 46(e) of the Judicial Code which provides that "A court in banc shall consist of all active circuit judges of the circuit."

The Government overlooks the provisions of Sections 43(b) and 296 of the Judicial Code. As the court below pointed out in its decision denying further rehearing in banc (Pet. app. 46), Judge Medina, prior to his retirement, had been designated and assigned under Section 46(c) to hear and determine this case as a member of the court in banc. Under Section 43(b)⁹ he was therefore competent after his retirement to sit as a member of the court; under the first paragraph

[&]quot;Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." (28 U.S.C. 43(b))

of Section 296¹⁰ be was directed to discharge all judicial duties for which he had been designated and assigned; and, under the second paragraph of Section 296, he had all the powers (except certain irrelevant ones) of a judge of the court to which he had been designated and assigned. "His status [was] the same as that of any active judge, so-called." Booth v. United States, 291 U.S., at 351.

This conclusion is supported by the language of Section 371(b) under which Judge Medina retired "from regular active service" which implies that he remained competent to perform "active" service; by the revisor's notes to 371(b), which state that the section was rewritten from Section 260 of the former Judicial Code (former 28 U.S.C. 375) to preserve the interpretation of the status retired judge declared in Booth v. United States, s. ra; and by the first paragraph of Section 456 of the present Judicial Code which refers to a retired judge "designated and assigned to active duty."

It is also supported by the established practice in the various circuits (which the Government called to the attention of the court below in its petition for further

^{10 &#}x27;A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.' (28 U.S.C. 296)

^{11 &}quot;Such [designated and assigned] justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices." (28 U.S.C. 296)

rehearing in banc, at R. 521a) of permitting retired circuit judges to participate in divisional decisions of cases which they heard prior to retirement.

Section 294 (d) provides that "no retired justice or judge shall perform judicial duties except when designated and assigned." The court below therefore correctly pointed out that the competency of a retired circuit judge to participate in such divisional decisions rested upon his designation and assignment before retirement as a member of the divisional court to hear and determine cases before that court, just as retired Judge Medina's competency to participate in the in banc decision in this case rested upon his designation and assignment before retirement as a member of the court in banc to hear and determine this case. (Pet. app. 46.)¹²

Judge Medina was plainly competent under the pertinent provisions of the statute to participate in the in bane decision of the court below.

III. The Practice in All Other Circuits in Which the Question Has Arisen Conforms to That of the Court Below

So far as respondent is aware, similar situations have arisen only in the Fifth and Ninth Circuits. A closely analogous situation has arisen in the Third Circuit.

¹² As was pointed out above (p. 11, supra), between March 1, 1958, the date of his retirement, and July 28, 1958, the date of the in banc decision of the court below, Judge Medina, without challenge from anyone and with no designation and assignment other than his designation and assignment before he retired, participated after retirement in decisions of 36 cases, in 20 of which the Government was a party. These cases are listed in the appendix hereto, at page 1a, post.

The Fifth Circuit cases are Commercial Nat. Bank in Shreveport v. Connolly, decided in banc on September 6, 1949 (176 F. 2d 1004), petition for rehearing in banc denied on November 16, 1949 (177 F. 2d 514), and United States v. Sentinel Fire Ins. Co., decided in banc on August 13, 1949, petition for rehearing in banc denied on December 2, 1946 (178 F. 2d 217). In these cases, in conformity with the views expressed by the majority of the Court of Appeals in this case (Pet. app. 46), Judge Sibley, who had sat with the court in banc in each case and participated in its decision, subsequently retired on October 1, 1949 and thereafter. as a member of the court in banc, cast the deciding vote in each case denying rehearing in banc. 13

The Ninth Circuit cases are Herzog v. United States, 235 F. 2d 664, 670 fn.*, cert. denied, 352 U.S. 844 and

¹³ Judge Clark's reliance upon the Government's statement in its petition for further rehearing in bane (R. 518a) that Judge Sibley did not participate in the decision of these cases is misplaced. The reports in both cases plainly state that the petition for rehearing in bane, was denied per curiam, by the court consisting of Judge Sibley and four other judges, two of whom dissented. (177 F. 2d, at 514; 178 F. 2d, at 239.) If Judge Sibley had not participated in the in bane decisions the court would have followed the practice of noting the withdrawal of judges who do not participate in the court's decision, just as it noted that Judge Lee did not participate in the original in bane decision in the Sentinel Fire Insurance case. (178 F. 2d, at 219.) Cf. United States v. Silverman, 248 F. 2d, at 697 (2d Cir., 1957); In re Sawyer, 260 F. 2d, at 203, fn. 17 (9th Cir., 1958); Bailey v. Richardson, 341 U.S. 918. Judge Sibley's participation after retirement in the in bane decisions of the Commercial Nat. Bank. and Sentinel Fire Insurance cases is further substantiated by the dissenting opinions. The dissenting judges implied that Judge Sibley was wrongfully permitted to participate in the in bane decision, that his vote should not have been counted, that therefore, only two judges legally voted to deny rehearing, and that since there were six active judges in the Fifth Circuit, the vote of two judges was insufficient to deny rehearing.

In re Sawyer, 260 F. 2d 189, 203, fn. 17, rev'd on other grounds by the Supreme Court, June 29, 1959 (27 U. S. Law Week 4543). In both of these cases, the Ninth Circuit, in conformity with the views expressed by the majority of the Court of Appeals in this case, either held or implied that judges who, prior to retirement, had been designated and assigned as members of the court in banc were competent to participate in the in banc decisions reached after they had retired.

In Herzog v. United States, supra, the status of Judges Bone and Orr was precisely the same as that of Judge Medina in this case. As' members of the court in bane they heard argument in the case, thereafter retired from regular active service, and participated after retirement in the court's in bane decision. (235 F. 2d at 670, fn.*)

The Government's charge (Pet. 11) that the Ninth Circuit "reached conflicting results" in the Herzog case and in In re Sawyer is unfounded. The court did not deny to retired Judge Denman the right to participate in its in banc decision in In re Sawyer that it had permitted retired Judges Bone and Orr to exercise under similar circumstances in Herzog v. United States. Such caprice cannot fairly be imputed to the experienced judges of the Ninth Circuit. In-In re Sawyer, the court carefully explained that Judge Denman did not participate in the in banc decision becase he thought it "inappropriate" to do so. F. 2d, at 203, fn. 17.) The explanation lacked opoint unless the court assumed that retired Judge Denman was authorized to participate in the in banc decision if he were willing to assume that judicial duty.

The Third Circuit case is Bishop v. Bishop, 257 F. 2d 495 (1958). There Judge Magruder, an active circuit

judge of the First Circuit, sat by designation in the Third Circuit and participated in an in banc decision denying rehearing in banc. Since 28 U.S.C. 46(c) requires a rehearing in banc to be ordered "by a majority of the circuit judges of the circuit who are in active service," the case holds, in conformity with the views of the court below, that the status of a judge designated and assigned to the in banc court is the same as that of an active judge of the circuit for the purpose of participating in an in banc decision. 14

These are all the cases of which respondent is aware in which the question presented by petitioner or an analogous question has arisen.¹⁵ In all of

¹⁴ Judge Maris, a member of the court in bane, obviously aequiesced in Judge Magruder's participation in the court's in bane decision. It will be recalled that Judge Maris, as Chairman of the Judicial Conference Committee on the Revision of the Judicial Code, submitted the memorandum which is the genesis of the present 28 U.S.C. 46(e). See Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247, 253-54.

¹⁵ None of the cases cited by the Government (Pet. 11-12) to show "conflict or confusion" are in point. None of them involves the question presented in the petition. All except United States v. Silverman, 248 F. 2d 671, cert. denied, 355 U.S. 942, were cases in which retired judges who participated in panel decisions were not thereafter designated and assigned to the rehearing by the court in banc. Whether they should have been permitted to sit with the in banc court may be an interesting and important question. But it is not the question presented in this case. Judge Medina was designated and assigned to the court in banc, and the question presented here concerns his status as a member of that court after retirement.

Judge Medina and other Second Circuit judges did not withdrawfrom in banc proceedings in the cases cited at page 11 of the Petition (or in any other cases of which respondent is aware) as the Government says they did.

In the Silverman case, the same active judges who sat on the panel which decided the case subsequently participated in the rehearing in banc, and the Government's purpose in citing this case is not readily apparent.

them the result was the same—the retired judge or designated judge was permitted to participate in the court's in bane decision.

There is, therefore no conflict, or confusion in the circuits warranting the exercise of certiorari jurisdiction.

IV. The Court Below Correctly Decided the Substantive Issues Before It

The Court of Appeals decided in its in bane decision that respondent's cause of action for breach of the Maritime Commission's agreement to return upon final audit certain excessive preliminary payments of additional charter hire did not arise until the Maritime Administration refused to return such payments upon final audit, and that the issue of voluntary payment was not germane to the issue of jurisdiction (Pet. app. 27-29). Cf. Binderup v. Pathe Exchange, 263 U.S. 291, 304-05.

The court was plainly correct and the Government is not challenging its decision on the merits. The Government asks this Court to review not because it contends that the case was wrongly decided but because it contends that Judge Medina's participation made the decision invalid. Respondent does not agree.

It is respectfully submitted that this is an appropriate case in which this Court should "make such disposition of the case as justice may at this time require". Langues v. Green, 282 U.S. 531, 536-437. Inasmuch as the decision of the court below on the merits is incontestably correct, justice requires that it be affirmed without regard to the question of the effect of

Judge Medina's participation therein. There is therefore little point in deciding that question.¹⁶

CONCLUSION

For these reasons, it is respectfully submitted that the Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1959.

learly to the Courf, respondent herein is filing simultaneously herewith a conditional cross-petition for a writ of certiorari, asking this Court to review the substantive issues in the case as well as the question presented by the Government in its petition if the Court grants the Government's petition for a writ of certiorari herein.

APPENDIX

Decisions in Which Judge Medina Participated Between the Date of His Retirement From Regular Active Service and the Date of the In Banc Decision of the Court Below

	Case	Decided	
	Perlman v. Commissioner of Internal Revenue, 258 F. 2d 890	Mar. 4, 1958.	
	Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F. 2d 29	Mar. 6, 1958	
	Riegelman's Estate v. Commissioner of Internal Revenue, 253 F. 2d 315	Mar. 10, 1958	
	United States v. Paradise, 253 F. 2d 319	Mar. 26, 1958	
1	Maher v. Isthmian Steamship Co., 253 F. 2d 414	Mar. 11, 1958	
	In re New Haven Clock & Watch Co., 253 F. 2d 577	Mar. 28, 1958	
0	In re Allen N. Spooner & Sons, Inc., 253 F. 2d 584	Mar. 10, 1958	100
	New York Credit Men's Adjustment Bureau, Inc. v. Samuel Breiter & Co., 253 F. 2d 675	Mar. 25, 1958	
	United States v. 15.03 Acres of Land, 253 F. 2d 698	Apr. 2, 1958	. 0
	Norda Essential Oil & Chemical Co. v. United States, 253 F. 2d 700 Rehearing denied.	Jan. 31, 1958 Apr. 14, 1958	
	Lewis v. Commissioner of Internal Revenue, 258 F. 2d 821	Apr. 7, 1958	
1	Excelsior Hardware Co. v. John Hancock Mut. L. Ins. Co., 254 F. 2d 6	Apr. 7, 1958	
	Frasier v. Public Service Interstate Trans. Co., 254 F. 2d 132	Apr. 16, 1958	
	Bennett v. The Mormacteal, 254 F. 2d 138	Mar. 13, 1958	
	United States ex rel. Farnsworth v. Murphy, 254 F. 2d 438	Apr 15, 1958	
	. United States v. Palmiotti, 254 F. 2d 491	Apr. 18, 1958	
	Monteiro v. Sociedad Mar. San Nicolas, S.A., 254 F. 2d 514	Apr. 14, 1958	
	Murray v. New York, N. II. & H. R. Co., 255 F. 2d 42	May 5, 1958	

Case	Decided
Roth v. United States, 255 F. 2d 440	May 22, 1958
United States v. A-1 Meat Co., 255 F. 2d 491	May 23, 1958
United States v. Eastport Steamship Corp., 255 F. 2d 795	May 6, 1958
, Grace Line, Inc. v. United States, 255 F. 2d 810	May 6, 1958
Isthmian Steamship Co. v. United States, 255 F. 2d 816	May 6, 1958
Isbrandtsen Co. v. United States, 255 F. 2d 817	May 6, 1958
United States v. Beard, 256 F. 2d 76	May 23, 1958
Bliss v. Commissioner of Internal Revenue, 256 F. 2d 533	June 18, 1958
Hight v. United States, 256-F. 2d 795	June 18, 1958
Wagman v. Arnold, 257 F. 2d 272	June 13, 1958
United States v. Ross, 257 F. 2d 292	July 2, 1958
Smith v. Sinclair Refining Co., 257 F. 2d 328	July 7, 1958.
Dellaripa v. New York, N. H. & H. R. Co, 257 F. 2d 733	July .4, 1958
Georgia-Pacific Corp. v. United States Plywood Corp. 258 F. 2d 124	July 1, 1958
Atalanta Trading Corp. v. Federal Trade Commission 258 F. 2d 365	July 28, 1958
N. L. R. B. v. Adhesive Products Corp. 258 F. 2d 403	July 3, 1958
Deep Sea Tankers, Limited v. The Long Branch, 258 F. 2d 757	July 14, 1958
Reardon v. California Tanker Co., 260 F. 24/369	Apr. •7, 1958

Office-Supreme Court, U.S.
FILED

AUG 22 1959

JAMES & BROWNING, CO

No. 138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, Petitioner

AMERICA -FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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August 22, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, Petitioner

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents named below oppose the petition for certiorari upon the grounds, more fully set forth infra, that (1) the narrow issue presented is one of rare, indeed unique, occurrence; (2) contrary to Petitioner's assertion, there is no conflict among the circuits

The decisions of the Court of Appeals for the Second Circuit dealt with fourteen consolidated appeals of twelve appellants, who are respondents here. This brief is filed on behalf of the following eleven of such appellants: Stockard Steamship Corporation; A. H. Bull Steamship Co., et al.; New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; Polarus Steamship Co., Inc.; A. L. Burbank & Company, Ltd.; T. J. Stevenson & Co., Inc.; North Atlantic and Gulf Steamship Co.; Luckenbach Steamship Company, Inc.; Fall River Navigation Co.; and Blidberg Rothchild Co., Inc.

on this issue; (3) the judgments below are interlocutory; and (4) the decisions of which review is sought are manifestly sound, practical and right. If, however, the petition for certiorari is granted, Respondents seek comprehensive review of the broader issues in accordance with the conditional cross-petition for a writ of certiorari filed concurrently herewith.

OPINIONS BELOW

The relevant opinions and judgments below are set forth in Petitioner's Appendix (hereinafter Pet. App.) pp. 14-50. The opinion of the Court of Appeals, dated July 28, 1958 (Pet. App. 23-44), of which the Government seeks review, and the opinions of the Court of Appeals denying the Government's petition for further thearing en banc, dated March 26, 1959 (Pet. App. 32), are reported at 265 F. 2d 136.

JURISDICTION

The jurisdictional requisites are adequately set forthin the petition.

QUESTIONS PRESENTED

(a) Does a court of appeals sitting en banc, consisting of all the active judges of the circuit (except Judge Lumbard who deemed himself disqualified because of association with the litigation during his tenure as United States Attorney), cease to be properly constituted by reason of the retirement of one of the members of the court after submission of briefs by the parties but before publication of the court's opinion; (b) does the retirement of a member of such en banc court render him ineligible to participate in the decision of the court even though his retirement oc-

curred after he (1) had sat on the three-judge panel which originally decided the cases; (2) had participated in the decision of the court to grant the petition for reargument en banc; and (3) had received and presumably considered the briefs of the parties submitted on the reargument en banc.

STATUTES INVOLVED

The statutes involved are:

28 U.S.C. 43(b):

Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 46(c):

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in bane is ordered by a majority of the circuit judges of the circuit who are in active service. A court in bane shall consist of all active circuit judges of the circuit.

28 U.S.C. 296:

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. 371(b):

Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

STATEMENT

The court below held that Respondents had successfully met Petitioner's jurisdictional attack. The issue is more fully discussed in Respondents' accompanying cross-petition for certiorari. It seems sufficient to state here that Respondents chartered Government owned vessels under a standard form of charter drafted by the United States Maritime Commission.² Clause 13.

² The Commission and its successor, the Federal Maritime Administration, are sometimes hereinafter referred to as "Maritime".

of the charter³ made all payments of additional charter hire preliminary and tentative and reserved all disputes until final audit by Maritime of the charterer's accountings. A number of disputes arose between the charterers and Maritime. Nevertheless, pursuant to clause 13 and at the repeated insistence of Maritime.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required. (Pet. App. pp. 25-26, n. 3)

⁴ To charterers who questioned the amounts asserted by Maritime to be due Maritime preste letters containing statements of which the following excerpts are illustrative:

(a) Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954. (Court of Appeals Record pages 10%-110a, hereinafter "C.A. Rec.").

(b) From the provisions of Clause 13 quoted in our letter of May 19, 1955, it is evident that situations such as you point out in your letter were anticipated at the time of enter-

³ Clause 13 provided in relevent part:

the charterers made preliminary and tentative payments on Maritime's theories, as they were required to do by clause 13.5 When their accountings were audited, Respondents demanded refund of alleged overpayments. Maritime refused their demands and they brought suit. Each libel was filed within two years of Maritime's audit.

ing into the contracts, and in view thereof, provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.

Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded. (C.A. Rec. 117a-118a)

To all charterers Maritime sent a circular letter stating:

Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise. (Pet. App. p. 27, n. 4, C.A. Rec. 163a-164a).

The relevant language is:

The Charterer agrees to make preliminary payments to the Owner . . . at such times in such amounts as may be requested by the Owner.

Petitioner excepted to the libels on jurisdictional grounds, asserting that they were barred by the two year statute of limitations in the Suits in Admiralty Act (46 U.S.C. 745). Petitioner asserted that the statute of limitations began to run from the date of redelivery of the last chartered vessel. Respondents: submitted affidavits, other evidence and briefs showing (a) the delay, inherent in the steamship business, in ascertaining operational results and other background reasons for deferring all disputes until final audit, (b) the intent of the parties to defer the disputes. (c) Maritime's repeated insistence upon such deferral, and (d) Maritime's delays in suing regulations, essential to the settlement of accounts, which made deferral of disputes a practical necessity. (Pet. App. pp. 26-27), Petitioner filed no answering affidavits or other evidence. The court below, sitting en banc, held that · clause 13 was intended to and did reserve the disputes

The district court held that some payments made within two years of the libels were unrecoverable as "voluntary payments", although this question was not raised in Petitioner's exceptions. The court below held that this was not germane to the issue of jurisdiction (Pet. App. p. 28). In any event, tentative payments made under an agreement providing that they are preliminary and recoverable are not "voluntary." 70° C.J.S. sees. 144, 153; United States y. Ohio Oil Co., 163 F. 2d 633, 638 (10 Cir. 1947), cert. denied, 333 U.S. 833; Richfield Oil Corporation v. United States, 248 F. 2d 217 (9 Cir. 1957); In re N.Y., O. & W.R. Co., 178 F. 2d 765, 766 (2 Cir. 1950); Empire Engineering Co., Inc. v. United States, 59 C. Cls. 904 (1923).

^{7 46} U.S.C. 745 provides in relevant part:

That suits as herein authorized may be brought only within two years after the cause of action arises . . .

^{*}In its briefs on rehearing en banc Petitioner argued further that, as to each payment, the statute began to run from the date of payment.

(Pet. App. pp. 29, 31). In doing so it reversed the district court dismissals of Respondents' libels and overruled Sword Line Inc. v. United States, 228 F. 2d, 344 (2 Cir. 1955), aff'd on rehearing, 230 F. 2d 75 (1956), cert. denied as to the statute of limitations issue (affirmed as to admiralty jurisdiction) 351 U.S. 976 (1956) and American Eastern Corp. v. United States, 231 F. 2d 664 (2 Cir. 1956), cert. denied, 351 U.S. 983 (1956).

The en banc court below also withdrew the earlier opinion by a three-judge panel consisting of Circuit Judges Hincks and Medina and District Judge Leibell. That panel questioned the correctness of the Sword Line and American Eastern holdings but nevertheless followed them out of considerations of comity as follows:

If the subject-matter of these appeals were res nova, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these re-

In its brief on rehearing en banc Petitioner asserted for the first time that the term "each final audit" in clause 13 referred to each Annual audit. The court held that this issue could be tried in the district court "after giving the Government opportunity to raise such issues of fact as may be desired" (Pet. App. pp. 29-30).

¹⁰ As noted below, in Sword Line the statute of limitations issue was raised for the first time on appeal. The district court had dismissed the libel because it was barred by a composition in bankruptcy, and as to that point the court was in agreement. Judge Learned Hand, disagreeing with the other members of the panel, was of the opinion that, by reason of clause 13 of the charter, the statute of limitations began to run from the date of final audit, 228 F. 2d at p. 347. In American Eastern the Second. Circuit relied upon the Sword Line holding and, without opinion, affirmed the dismissal of the libel. (Pet. App. p. 28)

cent decisions of other panels of the court. On the authority of Sword Line and American Eastern we hold that these libels also were barred. (Pet. App. p. 21)

Because of the doubts expressed by the panel, Respondents petitioned for rehearing en banc and their petition was granted (C.A. Rec. 269a). The cases were submitted for decision without oral argument on January 20, 1958 when final briefs were presented. Six weeks later, on March 1, 1958, Judge Medina retired. The en banc opinion was dated July 28, 1958.

Petitioner seeks, reversal of the decisions below on the narrow ground that Judge Medina, who was concededly eligible, indeed was required by statute, 11 to be a member of the *en banc* court and to participate in the decisional process, was rendered ineligible to complete his work by reason of his retirement prior to announcement of the court's decision.

REASONS FOR DENYING THE WRIT I. THE ISSUES WERE CORRECTLY DECIDED

A. The Time Bar Issue

The court below properly held that the text of the contract (Clause 13), Respondents' uncontradicted, sworn evidence, and Maritime regulations and letters, supporting Despondents' position, had overcome Petitioner's exceptions, supported only by the unsworn, nearsay ipse dixit of Petitioner's counsel. That holding, which Petitioner does not here challenge, gave effect to the agreement of the parties as shown not only by the letter of the contract, but also by the un-

^{11 28} U.S.C. 46(e): . . . A court in banc shall consist of all active circuit judges of the circuit.

contradicted evidence of their intent.¹² The overruling of the jurisdictional exceptions was plainly right.

B. The Issue of Judge Medina's Eligibility

At the outset it should be noted that Petitioner seeks to equate the issue of the eligibility of a retired judge to participate in the decision of a case, which he undertook to hear and determine before retirement, with that of the eligibility of any retired judge (irrespective of whether or not he had been associated with the case involved) to vote on the granting or denial of a petition for reconsideration en banc (Pet. App. pp. 8-9). 13

¹² This was in accord with long standing authorities. The agreement was binding and was to be given effect. United States v. Seaboard Air Line Ry. Co., 22 F. 24 13, 115 (4 Cir. 1927); United States v. The South Star, 115 F. Supp. 102, 106 (S.D.N.Y. 1953), aff'd 210 F. 2d 44. It was to be construed in accordance with the intent of the parties, and, in the case of ambiguity against the drafter. Hollerbach v. United States, 233 U.S. 165, 172 (1914); United States v. Lennox Metal Manufacturing Co., 225 F. 2d 302, 315 (2 Cir. 1955); American Bemberg Corporation v. United States, 150 F. Supp. 355, 361 (Del. 1957), aff'd, 253 F. 2d 691 (3 Cir. 1958), cert. denied, 358 U.S. 827. All doubts had to be resolved against the party moving for summary dismissal. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Conley v. Gibson, 355 U.S. 41, 45-6 (1957); Righfield Oil Corporation v. United States, 248 F. 2d 217, 225 (9 Cir. 1957); Dunn v. United States, 1950' A.M.C. 1420, 1421 (S.D. Calif.); Warner v. First National Bank of Minneapolis, 236 F. 2d 853, 857 (8 Cir. 1956), cert, denied, 352 U.S. 927; Homan Mfg. Co. v. Long, 242 F. 2d 645, 653 (7 Cir. 1957).

of the petition. United States v. Silverman, 248 F, 2d 671 (2 Cir. 1957), cert. denied, 355 U.S. 942; Reardon v. Colifornia Tanker Co., 260 F. 2d 369 (2 Cir. 1958), cert. denied, 359 U.S. 926; Harmar Drive-In Theatre, Inc. v. Warner Bros., 241 F. 2d 937 (2 Cir. 1957), cert. denied, 355 U.S. 824; United States v. Gordon, 253 F. 2d 177, 191-192 (7 Cir. 1958), rev'd on other grounds, 344 U.S. 314.

The circuits are in disagreement as to the eligibility of a judge who, after retirement, has participated in a three-judge panel, to vote on the granting or denial of a petition for an banc reconsideration. But that, obviously, is not the problem now before this Court. There is nothing in the statute that precludes an active judge from deciding a case before him simply because he has retired before the decision is announced.

Judge Medina's retirement did not render him ineligible to participate in the decision of the properly constituted en banc court.

Judge Medina was designated and assigned to the en banc court to hear and determine the cases at bar. Petitioner, as it must, concedes that he was properly a member of the court when it was constituted.¹⁵ At

In Commercial Nat. Bank in Shreveport v. Connolly, 177 F. 2d 514 (1949), and United States v. Sentinal Fire Ins. Co., 178 F. 2d 17, 29 (1949), both in the Fifth Circuit, Judge Sibley retired after participating in en banc decisions. Thereafter he participated in the denial of petitions for further rehearings en banc.

In Bishop v. Bishop, 257 F. 2d 495, 501-502 (3 Cir. 1958), c.rt. denied, 359 U.S. 914, Judge Magruder of the First Circuit sat by designation as a member of a three-judge panel in the Third Circuit. Thereafter he participated in the decision denying rehearing en banc.

¹⁴ In G. H. Miller & Co. v. United States, 260 FM 2d 286, 305-307 (7 Cir. 1955), cert. denied, 359 U.S. 907, Judge Schnackenberg in a well reasoned dissent holds that a retired judge, designated to hear a case as a member of a three-judge panel, is, with respect to that case, an active judge within the meaning of 28 U.S.C. 46(c) and is therefore eligible to participate in en banc reconsideration of that case.

¹⁵ Under Petitioner's interpretation, if a new judge had been appointed to the circuit, the *en banc* court, which concededly was properly constituted, would have had to be reconstituted to permit him to join in the decision. For the statute states that the *en banc* court "shall consist of all active circuit judges". And,

that date he had not yet retired and his inclusion in the court was mandatory under the statute. As a member of the court he had assumed duties which he was required by law to discharge. 28 U.S.C. 296 provides:

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Failure to participate in the decision would have constituted a breach of his statutory obligation.

It is difficult to perceive any reasonable ground for barring Judge Medina from carrying to conclusion the work thus properly undertaken. There is nothing to indicate any such legislative intent. Indeed the legislative purpose, plainly expressed in a slightly different but none the less analogous context, is that a judge be permitted to complete the work he has begun. Thus 28 U.S.C. 296 further provides:

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted

if the date of decision were controlling, the vote of the new judge would be required.

But, as was pointed out below, (Pet. App. p. 45), the statute cannot reasonably be read as requiring reconstitution of the court every time a member retires or a new judge is appointed to the circuit. On the contrary, the propriety of the constitution of a court is and, as a matter of practical necessity, must be judged as of the date of constitution.

to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

Neither absence from the district to which he has been designated and assigned nor expiration of his designation and assignment renders a judge ineligible to make or participate in the decision of all matters that were properly before him during the period of his designation. Frad v. Kelly, 302 U.S. 312, 316-317 (1937); United States ex rel. Paetau v. Watkins, 164 F. 2d 457, 459-460, n. 1 (2 Cir. 1947).

The principle that a judge remains eligible to complete work properly undertaken is one of long standing. Cheesman v. Hart, 42 Fed. 98, 105-106 (Colo. 1890); United States v. Garsson, 291 Fed. 646, 647-648 (S.D.N.Y. 1923); Hicks v. U.S.S.B.E.F. Corp., 14 F. 2d 316, 317 (S.D.N.Y. 1926); Sunrise Mayonnaise v. Swift & Co., 88 F. Supp. 187, 189 (E.D. Pa. 1949); United States v. Marachowsky, 213 F. 2d 235, 244 (7 Cir. 1954).

Even the death or physical disability of a judge has not prevented effectuation of his vote and acceptance of his opinion where these were known. In National Surety Co. v. Massachusetts Bonding & Ins. Co., 19 F. 2d 448, 453 (2 Cir. May 2, 1927), cert. denied, 275 U.S. 548, Circuit Judge Hough was absent from the court at the time of decision. He died shortly thereafter. Nevertheless his concurrence in the result made Judge Manton's opinion, which he had not read, the prevailing opinion over the dissent of Judge Swan.

¹⁶ In Hatch v. Morosco Holding Co., 19 F. 2d 766, 769 (2 Cir. May 9, 1927), aff'd, 279 U.S. 218, decided one week later, he was referred to as the late Circuit Judge Hough.

The principle that a judge must complete his work was given effect (in precisely the same situation as the one at bar) in *Herzog v. United States*, 235 F. 2d 664, 670, n. (9 Cir. 1956), cert. denied, 352 U.S. 884. There, two judges of an en banc court retired shortly before the decision was rendered, and, nevertheless, participated in the decision.

To hold otherwise would frustrate a basic purpose of en banc consideration which is to resolve intracircuit conflicts. Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247, 270 (1953; concurring opinion of Mr. Justice Frankfurter). If the vote of the judge who has retired is not decisive, his participation or abstention is not a matter of major significance. It becomes significant only where, as here, the court is deadlocked but for his vote. Thus, contrary to Petitioner's assertion (Pet. p. 8), the upholding of Judge Medina's eligibility is consistent with and effectuates the purpose of the en banc procedure.

2. Decision as to Judge Medina's eligibility would not affect the binding force of his vote.

Finally, even if Petitioner's strained and wholly impracticable construction of 28 U.S.C. 46(e) were deemed to have some merit, that still would not call for reversal of the decision below for it would only mean that Judge Medina was a de facto, rather than a de jure, member of the en banc court and his acts would be as binding in the one case as in the other. Ball v. United States, 140 U.S. 118, 128-129 (1891); Ex Parte Ward, 173 U.S. 452, 455, 456 (1899); Two

¹⁷ Chief Judge Clark who raised the issue of Judge Medina's eligibility expressed "some personal regret and even doubt as to the ultimate wisdom of the policy" which he felt made Judge Medina ineligible (Pet. App. p. 48).

Guys From Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 430-431, n. 1 (3 Cir. 1959).

II. THE NARROW ISSUE PRESENTED IS OF RARE OCCURRENCE AND HAS BEEN UNIFORMLY DECIDED.

The issue posed by the petition for certiorari is one of rare occurrence. And, although perhaps not lacking in academic interest, it is neither of major significance nor sufficiently controversial to warrant review at this interlocutory stage of the proceedings.¹⁸

Research reveals only two other cases in which the same issue arose, both in the Ninth Circuit. Herzog v. U. S., 235 F. 2d 664, 670, n. (1956), cert. denied 352 U.S. 884: In re Sawyer, 260 F. 2d 189, 203, n. 17 (1958), reversed on other grounds, 27 Law Week 4543. In Herzog, Judges Bone and Orr were members of an en bang court although they had retired between submission of the case and announcement of the decision, As did Judge Medina below, they participated in the decision. In Sawyer, Chief Judge Denman participated in the proceedings of an en banc court and retired before announcement of the decision. He did not participate in the decision because, as the report of the case notes, he thought it inappropriate to do so. This was an expression of his individual view, not that of the court. In Herzog, on the other hand, in light of the absence

¹⁸ The court below has held merely that the libels are not time barred and Petitioner has not sought certiorari even on this question. The merits have not been reached except in Dichmann, Wright & Pugh, Inc. v. United States, 144 F. Supp. 922 (S.D.N.Y. 1956), in which Judge Dimock overruled Petitioner's exceptions on the merits and held that the Government had unlawfully exacted additional charter hire in excess of the statutory mandate. Petitioner has not appealed from this decision but has filed time bar exceptions which are now pending in the district court awaiting final action in the instant cases.

of criticism or comment, even from the dissenters, it may be assumed that the participation of the retired judges had the approval of the whole court.

Thus, there is an absence of conflict among the circuits, and the issue is of a low order of urgency since the decision below is the only one in which the vote of the retired judge was decisive in the *en banc* decision.¹⁹

CONCLUSION

The considerations generally moving this Court to grant petitions for writs of certiorari: importance of the issue; inter-circuit conflict; patent error, are wholly lacking here. The instant petition should, therefore, be denied.

Respectfully submitted,

J. Franklin Fort, 529 Tower Building, Washington 5, D. C. Counsel for Respondents.

Kominers & Fort, John Cunningham, Israel Convisser, Of Counsel.

August 22, 1959

¹⁹ In Sawyer there was no dissent. In Herzog the vote was 6 to 3. Neither the participation of Judge Denman nor the ab tention of Judges Bone and Orr would have shifted the result in either case.

OCT 13 1959

No. 138

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

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October, 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138 .

UNITED STATES OF AMERICA, PETITIONER

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

On August 12, 1959, the Government filed in the District Court its answer on the merits to the amended libel herein. On September 9, 1959 respondent filed exceptions and exceptive allegations thereto and asked for a decree *pro confesso* on the pleadings. The case, therefore, is now in a position to proceed to final judg-

At approximately the same times the Government filed substantially similar answers, in the thirteen other cases which are included in the instant petition, and the libelants in those cases filed similar exceptions and exceptive allegations and asked for the same relief.

ment in the District Court and there is no need for this Court to decide at this time the question presented in the Government's petition, which the proceedings now pending in the District Court may render moot.

Respectfully submitted,

ARTHUR M. BECKER 839 17th Street, N. W. Washington 6, D. C. Counsel for Respondent

Of Counsel:

GERALD B. GREENWALD Washington, D C.

October, 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, PETITIONER

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIGRARI TO THE VNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Palmieri, D.J.) covering 11 of the 14 libels involved (R. 64-66) is reported as A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D.J.) covering the other three libels (R. 102) is not reported, but it is set forth in footnote 2 to the opinion of the three-judge panel of the United States Court of Appeals for the Second Circuit reported at 265 F. 2d 136, 140 (R. 108). The opinion of the three-judge panel of the Court of Appeals, dated September 25, 1957 (R. 104-113), the

opinion of the Court of Appeals on petition for rehearing en banc, dated July 28, 1958 (R. 115-135), and the opinion of the Court of Appeals denying the petition for further rehearing en banc, dated March 26, 1959 (R. 137-140), are reported at 265 F. 2d 136.

JURISDICTION

The opinion of the three-judge panel of the Court of Appeals was entered on September 25, 1957 (R. 107). Respondents filed a timely petition for rehearing en banc which was granted on December 19, 1957 (R. 114). The judgments of the Court of Appeals, sitting en banc, were entered on July 28, 1958 (R. 136). The United States then filed a petition for further rehearing en banc which was entertained by the Court of Appeals. By its opinion and order of March 26, 1959, the Court of Appeals denied the petition for further rehearing en banc (R. 137-141). The Government's petition for certiorari was filed on June 23, 1959, and was granted on October 19, 1959 (R. 142). 361 U.S. 861. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a circuit judge who retires prior to the decision of a court of appeals sitting on rehearing en banc is an "active" circuit judge entitled to participate in the en banc decision under 28 U.S.C. 46(c).

STATUTE INVOLVED

28 U.S.C. 46(c) provides:

Cases and controversies shall be heard and determined by a court or division of not more

than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

Relevant portions of other statutory provisions are set forth in the Appendix, infra, pp. 30-34.

STATEMENT

1. The nature of the litigation

Each of the respondents chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U.S.C. App. 1735, et seq., and agreed in Clause 131 of their charters to terms which made additional charter hire dependent in part upon the amount of profit realized by the charterer. Respondents' libels below were predicated on the claim that the Maritime Commission, in providing for a "sliding scale" whereby the Government might obtain as much as 90% of the profits in excess of \$300 per day, per vessel, above a certain return on employed capital, violated the provisions of Section 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 U.S.C. 1199(a), allegedly limiting the Government to a flat 50% of profits above the return on employed capital (R. 1-8, 24-30). Respondents thus sought to recover amounts of additional charter hire in excess of this 50% rate, on the theory that such amounts were illegally assessed by the Commission (R. 4-7, 25-28). In addition, certain of the libels challenged, inter alia,

¹ Clause 13 of the charters is set out in its entirety as footnote 3 to the July 28, 1958 opinion of the Court of Appeals on rehearing en banc (R. 120-121).

the Maritime Commission's determinations under the charters as to the amount of "capital necessarily employed," "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims were barred by the two-year limitation prescribed by the Suits in Admiralty Act, 46 U.S.C. 745 (R. 17).

2. The proceedings below

In the District Court, the libels were dismissed by Judges Palmieri and Herlands as time-barred, on the the authority of the Second Circuit decisions in Sword Line, Inc. v. United States, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed on the question of admiralty jurisdiction, 351 U.S. 976, and American Eastern Corp. v. United States, 133 F. Supp. 11 (S.D.N.Y.), affirmed per curiam, 231 F. 2d 664, certiorari denied, 351 U.S. 983 (R. 64-66, 102).

These decisions were affirmed on September 25, 1957, by a three-judge panel of the Second Circuit consisting of active Circuit Judges Hincks and Medina and retired District Judge Leibell. The court

² Judge Palmieri's opinion, as we have noted, is reported at 141 F. Supp. 58, and Judge Herlands' can be found in footnote 2 to the opinion of the three-judge panel of the Court of Appeals (R. 108).

The appeal of one of the libelants—Dichmann, Wright and Pugh—was dismissed as an interfocutory admiralty appeal filed out of time (R. 109). On the en banc reversal with regard to the other libels, the decision as to this one appeal was reaffirmed (R. 119-129).

ruled that each of the various arguments advanced by respondents to avoid the statute of limitations had been urged by the libelants on the identical issue in the earlier Sword Line and American Eastern cases, and had been disposed of against the libelants by those decisions (R. 111-112).

On December 19, 1957, the Court of Appeals entered an order granting libelants' petition for a rehearing en banc on the question of the statute of limitations and further ordered that argument was to be confined to briefs alone (R. 114). The order, signed by Judge Medina who was at that time an active circuit judge, required that briefs be submitted within twenty days. On March 1, 1958, Judge Medina retired pursuant to the provisions of 28 U.S.C. 371(b) (App., infra, pp. 33-34) (R. 135, 137).

On July 28, 1958, almost five months subsequent to Judge Medina's retirement, the Court of Appeals handed down its en-banc decision withdrawing the earlier panel opinion and reversing the District Court decisions. The majority consisted of active Circuit Judges Hincks and Moore and retired Circuit Judge Medina; the dissenters were active Circuit Judges Clark and Waterman. The majority, in an opinion written by Judge Hincks, overruled the prior decisions in Sward Line and American Eastern and held that Clause 13 of the charters established an

Active Circuit Judge Lumbard did not participate in the en banc proceeding because of a prior connection with these cases as United States Attorney.

There had been no indication, following Judge Medina's retirement, that he would participate in the decision of the cases on rehearing.

adequate, "prima facie, showing of jurisdiction" (R. 123-125). The court further determined, however, that the parties should be given an opportunity to adduce evidence respecting the intended meaning of Clause 13. Accordingly, it remanded the causes to the District Court for disposition on the issue of limitations which might take into account such evidence as might be introduced (R. 124).

In a dissenting opinion concurred in by Judge Waterman, Chief Judge Clark observed that the normal-rule in actions for unjust enrichment, as declared by the Second Circuit in ruling on the same question of limitations in Sword Line and American Eastern, which also involved charter Clause 13, is that the period begins to run when the first payment of additional charter hire is made (R. 127-128). This rule should be set aside, he said, only if the charter plainly manifests a contrary purpose; yet, the majority had found no such contrary expression of intention in Clause, 13. Moreover, analysis of this clause and the underlying regulations demonstrated to him that they were in no way concerned with libelants' claim of illegal assessment of additional charter hire and that the Second Circuit's earlier deeisions in Sword Line and American Eastern were clearly correct (R. 130-134). Finally, Judge Clark expressed doubt, in view of the provisions of 28 U.S.C. 46(c), supra, pp. 2-3, as to the validity of Judge Me-

⁵ These libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in Sword Line, Inc. v. United States, 351 U.S. 976.

dina's participation in the en banc decision reached subsequent to his retirement (R. 135):

The Government then filed a petition for further rehearing en banc, directed primarily to the question of the validity of Judge Medina's participation in the en banc determination of July 28, 1958. On March 26, 1959, this petition was denied, the court dividing as it had on the prior en banc decision. The majority, consisting of Judges Hincks, Moore and Medina, ruled (in an opinion by Judge Hingks) that once an en banc) court or a three-judge panel is initially constituted according to law, there is no need for the court "to suspend its * * * task" or "reconstitute itself" upon the retirement of an active judge (R. 138). The majority also derived support for its view that Judge Medina's participation in the en banc decision was valid from other provisions of the Judicial Code, namely, 28 U.S.C. 43(b), 294(b), and 296 (App., F infra, pp. 30-31, 32-33) (R. 137-139).

In a separate statement, Judges Clark and Waterman expressed the opinion that Judge Medina's action was precluded by the plain language of 28 U.S.C. 46(c). Moreover, examination of other provisions of the Judicial Code confirmed their view that active judges of the court of appeals alone could participate in en banc decisions of the circuit. Pointing to similar conclusions by other courts of appeals in analogous situations, Judges Clark and Waterman underscored the "obviously indicated policy" of 28 U.S.C. 46(c) of permitting only active circuit judges to determine "the major doctunal trends of the future for their court" (R. 140). It was their conclusion

that the en banc decision of July 28, 1958, was "void for lack of a valid majority vote" by reason of Judge Medina's participation, and that the decrees of the District Court "must stand affirmed by an equally divided court" (R. 140).

3. The petitions for writs of certiorari

The Government's petition for a writ of certiorari in this case, No. 138, was expressly limited to the question of the validity of Judge Medina's participation in the en banc decision of the court below. As pointed out in its memorandum to this Court in Nos. 322 and 334, this Term, the Government failed to petition on the limitations question, not because it considered the en banc determination on this issue correct, but because (1) the identical issue had not been taken by this Court on certiorari in the recent Sword Line and American Eastern decisions, and (2) a valid en banc decision by the Second Circuit was deemed a prerequisite to certiorari review by this Court.

In Nos. 322 and 334, this Term, respondents in this case, No. 138, have attempted to bring the limitations issue before the Court by conditional cross-petitions seeking writs of certiorari if the Government's petition on the *en banc* issue was granted. The Court has not as yet taken any action with regard to these conditional cross-petitions.

SUMMARY OF ARGUMENT

1

The participation by Judge Medina in the en banco decision below subsequent to his retirement from ac-

tive service-a participation which resulted in a majority for reversal of previous decisions in this case and the overruling of two recent Second Circuit precedents-was precluded by 28 U.S.C. 46(c). Section 46(c) plainly limits the power to hear and determine, in each phase of Court of Appeals en banc proceedings, to active circuit judges of the circuit involved and provides no exception for judges who, like Judge Medina here, retire subsequent to en banc hearing but prior to en banc determination. policy of the statute was obviously, in the words of the dissent below, to permit only "active circuit judges [to] determine the major doctrinal trends of the future for their court" (R. 140). And the textual meaning of the statute is supported by the available legislative history.

Nor can the respondents, as the majority below sought to do, look to other provisions of the Judicial Code, dealing with designation and assignment to duty, to provide Judge Medina with the power to act on the en banc rehearing. These provisions confer on judges designated and assigned only those powers not restricted under such specific statutory authorization as Section 46(c) to active circuit judges of the circuit involved. Any other interpretation would render completely meaningless such provisions as Section 46(c) by which the power to act in specified circumstances is limited to active judges. And reliance on these other provisions requires the conclusion that judges from any other federal court may, solely by virtue of designation and assignment, participate in en banc resolution of matters by a particular court

of appeals, a result incompatible with the policy and purposes of en bane proceedings.

II

Judge Medina's participation in the en banc decision below, contrary to the controlling provisions of Section 46(c), renders that en banc decision void. This Court has consistently held, in accord with firmly established principle, that whenever a judge acts beyond his statutory powers, the decision rendered by him or in which he took part is a pullity. American Construction Company v. Jacksonville Railway, 148 U.S. 372; Johnson v. Manhattan Ry. Co., 289 U.S. 479; Frad v. Kelly, 302 U.S. 312. Accordingly, the en banc decision below must be vacated and the case remaided for further proceedings by the Second Circuit in conformity with the provisions of 28 U.S.C. 46(c).

ARGUMENT

I. The express provisions and underlying policy of 28 U.S.C. 46(c), governing en banc proceedings, precluded retired Judge Medina's participation in the en banc decision in this case

A. The statute and its basic purposes

1. 28 U.S.C. 46(c), supra, pp. 2-3, enacted and incorporated into the Judicial Code in 1948, clearly appears to us to preclude the vote, in en banc decisions, of any judge other than an active circuit judge of the particular circuit sitting en banc. The statute provides in its opening sentence, dealing with ordinary panel dispositions of courts of appeals, that cases shall be heard and determined by a court or division of not more than three judges. An exception is then pro-

vided for a hearing or rehearing en banc "ordered by a majority of the circuit judges of the circuit who are in active service". If a hearing or rehearing en banc is granted by a majority of the active circuit judges, then the court en banc "shall consist of all active circuit judges of the circuit".

In view of these provisions, it is plain that in a court of appeals panel proceeding, as opposed to the en banc situation, three judges of the court, either active judges of the circuit involved or judges otherwise qualified and acting under designation and assignment, have the power to hear and determine cases and controversies. In the en banc proceeding, on the other hand, it is the active circuit judges of the circuit, and only these judges, who have the power to hear and determine. Hence, while Judge Medina had the power under 28 U.S.C. 46(c) to participate in the decision below to grant rehearing en banc on December 19, 1957, and to hear the case (by studying the briefs) until March 1, 1958, his retirement on the latter date precluded him from participating in the en banc decision of July 28, 1958;

In reaching a contrary conclusion, the majority below appears to have drawn a distinction between the situation where retirement occurs before the grant of a petition to rehear en banc and the situation where (as here) the retirement occurs in the interval between such grant and the date of decision (R. 138). But this does not seem to us a permissible interpretation of the statute. As we have seen, the grant of power under 28 U.S.C. 46(c) extends to both the hearing and the determination of cases, and partici-

pation in each of these phases is expressly reserved, in the en banc situation, to active circuit judges of the circuit. There is no basis under 28 U.S.C. 46(c) for the majority's suggestion that the power to vote on the petition for reheating en banc, and to hear the case en banc at that time because of active service status, confers the power subsequently to determine the case en banc regardless of active or retired status on the date of decision. In short, the reading of the statute by the majority below simply abrogates that part of the statutory grant of power governing the determination of en banc cases and controversies:

This distinction drawn by the majority, furthermore, creates a result which, upon examination of each aspect of the en banc proceeding under 28 U.S.C. . 45(c), seems plainly unintended. As the majority's distinction admits, and is the statute makes clear, had Judge Medina retired prior to the court's action on the petition for rehearing en banc, he would not have been qualified (under the Second Circuit's own practice) to vote for the grant of that petition (see discussion, infra, pp. 17; 23-24, fn. 23). It would have made do difference that he had acquired familiarity with the case as a member of the three-judge panel, that he had been an active circuit judge when the petition for rehearing en banc was filed, that he had considered the briefs urging and opposing such a rehearing en. banc, or that he had definite views about the importance of the case in terms of en banc resolution. would, nevertheless, not have been empowered to vote on the granting or denial of the petition for an en banc rehearing. In these circumstances, it is anomalous

to suggest, as did the majority below, that, merely because the judge's retirement does not occur until after the petition has been acted upon (but prior to the hearing or determination on the merits), he is not precluded from participation in the ultimate decision on the merits. The necessary status for the judge's power to determine, as well as to hear, is clearly the same under 28 U.S.C. 46(c) for each of the phases of the en banc procedure: that of an active circuit judge of the circuit implementing the en banc procedure.

Moreover, the majority's professed fear that the Government's interpretation of 28 U.S.C. 46(c) would require an en banc court to "suspend its judicial task" and "reconstitute itself" (R. 138) appears highly illusory. The sole effect of Judge Medina's retirement from active service as of March 1, 1958, with regard to this en banc proceeding, was that the case would be carried through to ultimate disposition by four, rather than five, Second Circuit judges. There was no need for a new hearing as a result of Judge Medina's retirement and consequent disqualification under 28 U.S.C. 46(c).

As for the majority's concern with "suspen[sion of the] judicial task" and "reconstitution" of the court upon the appointment of a new active judge during en banc deliberation, this possible consequence would obtain equally in the situation where the retirement

As we have noted, there was no oral hearing on the limitations question by the en banc court here, but merely consideration of briefs under the December 19, 1957, order of the court granting the petition for rehearing en banc (R. 114).

took place before the vote on whether to grant rehearing en banc, but the appointment of the successor did not occur until after rehearing had been ordered and submitted. In that situation, as we have shown, the retired judge clearly would lack authority to participate under Section 46(c). The court of appeals would have the same choice as in the case where both the retirement and the appointment of a successor judge occurred after the rehearing had been submitted. It might proceed to decision on the merit without the participation of either the refired judge or his successor. Or it might permit the new active judge to participate (possibly without réargument, at least in a case, such as this, which had been submitted on briefs to the court en banc).

In sum, the considerations to which the majority below point have no bearing upon the statutory mandate. Whatever may be the effect of the appointment of a new judge from the standpoint of the necessity to reconstitute the *en banc* court, Congress has decreed that a retired circuit judge shall not participate in *en banc* determinations.

*The opinion below, as the dissenters pointed out, provides for a "freezing in" of a particular group of judges regardless of active or retired status (R. 140). Hence, had Judge

In connection with what we consider to be the clear mandate of 28 U.S.C. 46(c) as to the participation of retired judges, it is significant, we believe, that retired Justices of this Court do not participate in its decisions once they have retired, even in cases or matters in which they have heard argument or participated in earlier consideration. Under 28 U.S.C. 294(a), retired Justices may only be designated and assigned to duty in courts other than the Supreme Court. We view this provision as parallel to the provision of 28 U.S.C. 46(c) limiting en banc proceedings to active circuit judges.

2. Judge Medina's participation in the en banc decision was not only contrary to the controlling statutory provision but was also at odds with the basic's purposes motivating its enactment. The raison d' être for en bane proceedings has been set forth: by Judge Maris in'describing the en banc procedure of the Third Circuit." Hearing and Rehearing Cases in Banc, 14 F.R.D. 91. While noting that the "guiding consideration" for convening en banc was "the importance and the difficulty of the problem presented" (14 F.R.D. at 94), Judge Maris observed with particularity that a most crucial concern calling for en banc resolution was the presence of "serious strains in the court" on a given question which, if allowed to stand, would result in diametrically opposite panel conclusions.10 14 F.R.D. at 96. The same essential utility of the en bane proceeding has been pointed out by Mr. Justice Frankfurter in his concurring .

Medica's successor been appointed and qualified prior to enbanc disposition, under the majority's view he might be precluded from participating in the decision whereas Indge Medina would not. Or the majority's view might permit both to participate. The confusion as to the meaning of Section 46(c) engendered by the majority's approach is created by its refusal to recognize that the statute permits only active service judges to participate at each and every stage of the enabance proceeding.

⁹ See fn. 17, infra.

Judge Maris also made the observation, relevant to respondents attempt to bring the limitations issue to this Court, that while this Court might correct matters by review on certiorari, the Supreme Court "should not have to resolve conflicts of decision within a single court. The procedure in banc enables the court [of appeals] itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court". 14 F.R.D. at 96.

opinion in Western Pacific Railroad Case, 345 U.S. 247, 270.11 And it is evident from the opinions below and the prior history of the identical limitations issue in Sword Line and American Eastern that this consideration constituted the basis for the en banc proceeding by the Second Circuit in this case.

Hence, a most significant purpose of en banc proceedings is to avoid intra-circuit conflict by allowing a majority of the full court to hear a case and establish a single precedent binding on the circuit in the future. Cf. Wisniewski v. United . States, 353 U.S. 901. In granting this power to hear and determine en bane, Congress obviously had several choices available with regard to the equally important question of the make-up of the en banc tribunal. In view of the designation and assignment provisions of the Judicial Code,42 it was possible to grant the power for such determinations, not only to both active and retired members of the particular court of appeals, but also to judges of other federal courts. Section 46(c), however, left congressional intention entirely clear on this point. Only active judges of the circuit to which the en banc application was addressed were to hear and determine en banc.

In implementing these essential purposes of the en banc procedure, it is hardly surprising that Congress limited the power to act in en banc cases to circuit judges of the circuit. While a federal judge from another court might be designated and assigned to sit on a court of appeals panel, Congress believed that

¹⁵ See also, Note, 63 Harvard L. Rev. 1449 (1950).

²²⁸ U.S.C. 291-296. See infra. pp. 20-23, 30-34.

it would not be fitting to allow him either to participate in resolution of a conflict among the members of that circuit or to aid in establishing major doctrinal trends for it. Nor is it any the more surprising, we submit, that Congress further restricted the en banc powers to active circuit judges of the particular circuit. There are obvious differences in status and concomitant powers between active and retired judges of a given court, and for the extraordinary purposes of the en banc proceeding, Congress deemed it wiser to restrict the power to determine cases of such overriding importance to the permanent active membership.

Indeed the respondents, in common with the majority opinion below, do not seriously question that 28 U.S.C. 46(c) precludes participation in en banc determinations by judges who have retired from active service prior to the en banc proceeding. Their position, which, as we have pointed out (supra, pp. 10-14), is flatly refuted by the statutory language, is essentially that there is no statutory purpose achieved by barring Judge Medina's vote when his retirement took place after the commencement of en banc proceedings and only five months prior to ultimate disposition.

This contention, however, ignores the cardinal point that the crucial act, in the history of any particular en banc proceeding, is the ultimate resolution, i.e., as here, the decision en banc avoiding an intra-circuit conflict, or, in other cases, resolving a question considered to be of outstanding importance. As Mr. Justice

¹³ See fn, 20, infra, p. 22.

Frankfurter observed in Western Pacific Railroad Case, 345 U.S. 247, 270:

* * * [D]eterminations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. * * * [Emphasis added.]

And since it is the ultimate result (and its consequences) which are of greatest significance, it is surely the power to participate in fashioning that end-result to which the active status requirement of the statute is primarily directed. Since Judge Medina lacked that qualification at the critical moment the policy of restricting such decisions to active judges of the circuit was aborted by the majority opinion below.

itself sheds little light on the issue here, the history of a substantially similar predecessor bill (S. 1053, 77th Cong., 1st Sess.) which died in the Senate supports our interpretation. In hearings on that bill, Circuit Judges Groner and Biggs, testifying to the importance of en banc determinations in certain classes of cases, referred repeatedly to the number of active circuit judges in the various circuits who would participate in such decisions. Hearings before/a Subcom-

The Reviser's Note to Section 46(c) states that the provision was intended to codify the result in Textile Mills Corp. v. Commissioner, 314 U.S. 326. In Textile Mills, this Court, ruling that en bonc hearings involving more than three circuit judges were valid under the then applicable statute, upheld a rule of the Third Circuit permitting all active circuit judges to participate in en banc proceedings. In so doing, the Court carefully distinguished "active" from "retired." 314 U.S. at 3271

mittee of the Senate Committee on the Judiciary on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054, and H.R. 138, 77th Cong., Ist Sess., at pp. 14-15, 39-41. No mention was made during these hearings by anyone that retired judges might participate in the ultimate disposition of en banc cases, despite their possible participation in resolution or hearing of the case apart from or prior to en banc resolution. Nor was there any mention of their participation in the final en banc decision despite some concern over the question of the votes in circuits having an even number of active judges. 15

Furthermore, Judge Maris, whose proposal in 1944 as Chairman of the Judicial Conference Committee on the Revision of the Judicial Code constituted the genesis of Section 46(c), has described the Third Circuit en banc procedure as involving only the permanent active-service members of that court. Hearing and Rehearing Cases in Banc, 14 F.R.D. 91. Not once does he suggest that retired judges, like Judge Medina here, may participate in any phase of the en banc adjudication. It lbid.

¹⁵ See also H. Rep. No. 1246, 77th Cong., 1st Sess., and Annual Report of the Attorney General (1939), pp. 15-16.

It is to be noted that, at present, the Second, Sixth and Seventh Circuits are authorized an even number of active judges (6). 28 U.S.C. 44(a).

¹⁶ See Western Pacific Railroad Case, 345 U.S. 247, 253-254.

¹⁷ Respondents attempt to show that the Third Circuit practice is otherwise by reliance on Bishop v. Bishop, 257 F. 2d 495 (C.A. 3). In that case, Judge Magruder sat on the panel by designation. On a subsequent petition for rehearing (not en banc), the original panel concluded that nothing new was presented by petitioner and denied the petition. In this denial, it was noted that four circuit judges had not requested

B. Other provisions of the judicial code

The heavy reliance by respondents and the majority below on provisions of the Judicial Code other than Section 46(c), provisions having nothing to do (in our view) with en banc determinations, is clearly misplaced. Respondents claim that 28 U.S.C. 43(b), 294(b), and 296 indicate a congressional purpose to equate the status and powers of all federal judges who are designated and assigned to duty on a court of appeals with the status and powers of the active freuit judges of that court. From this premise respondents urge that Judge Medina, while not an active Second Circuit judge on the date of en bane decision, had the power under the designation and assignment provisions of the Judicial Code to participate in that decision.

Section 43(b) (App., infra, p. 30) provides, in essence, for two classes of court of appeals judges: (1) the circuit judges of the circuit in active service, and

Hastie dissented and expressed their views as to why they would grant rehearing en bane. There is nothing whatever to indicate, as respondents suggest, that Judge Magruder took part in anything but denial of the petition for panel rehearing or that he was given voice on whether rehearing en bane should be granted. The case was apparently submitted to the active judges in accordance with the Third Circuit's normal practice.

Our view of the Third Circuit practice is confirmed, moreover, by Judge Maris' action in the recent steel injunction case where, since he was retired at the time, he did not participate in the Third Circuit's decision whether to rehear en banc, and such rehearing was denied by an equally divided court. United States v. United Steelworkers of America, 271 F. 2d 676, affirmed, 361 U.S. 39.

¹⁸ See also the opinion of the majority below (R. 139).

(2) those justices and judges designated and assigned who shall also be competent to sit as judges of the court of appeals. Section 294(b) (App., infra, pp. 30-31) specifically permits the designation and assignment of retired federal judges to a court of appeals. Section 294(e) (App., infra, p. 32) provides that no retired judge shall perform judicial duties except when designated and assigned. Finally, Section 296 (App., infra, pp. 32-33) confers on the designated and assigned judges "all the powers of a judge of the court, circuit or district to which he is designated and assigned * * * " and the power to "decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

Analysis of these provisions, we submit, reveals that they did not confer on Judge Medina the power to participate in the en banc decision, which power he did not have under 28 U.S.C. 46(c). Section 43(b) indicates only that there are two types of circuit court judges and in no way suggests complete equalization of status and authority to act. Indeed, in making separate reference to active judges and to designated-and-assigned judges, Section 43(b) suggests that where another statutory provision, such as 28 U.S.C. 46(c), specifically limits authority to act to active circuit, judges of the circuit, those other judges who are designated and assigned are to be excluded.

It is Section 296, infra, pp. 32-33, that constitutes the

¹⁰ An exception is made for powers not relevant here.

heart of respondents' contention since it purports to grant to designated and assigned judges the powers of a judge of the court of appeals to which they are designated and assigned and to join in final disposition of all matters submitted to them during the period of designation. But this Section must be read as confining the powers it grants to those not specifically restricted elsewhere, as under Section 46(c) involved here, to active circuit judges of the circuit. Otherwise, these restrictive provisions would be meaningless. Moreover, respondents' suggested interpretation overlooks the fact, of which the statutory draftsmen must have been aware, that a judge cannot become an active judge by designation and assignment.

That Section 296 cannot support Judge Medina's participation in the *en banc* decision is further shown by the fact that any argument based on this provision applies as well to *all* other federal judges who, under

Section 46(c) is not unique in restricting power or status to active circuit judges of the circuit. Thus, 28 U.S.C. 45 (c) and (d) (App., infra, p. 30) permit only active service judges of courts of appeals to replace that court's chief judge in prescribed circumstances. 28 U.S.C. 295 (App., infra, p. 32) requires the consent of the chief judge or judicial council of the circuit for designation and assignment of active service judges alone. And 28 U.S.C. 332 and 333 (App., infra, p. 33) provide for a judicial council and conference of each circuit composed of judges in active service.

²¹ It is significant to note that Section 294, dealing in subsection (b) with designation and assignment of retired judges (App., infra, pp. 30-31), is captioned and deals exclusively with assignment to duties. It is also significant that Section 296, with respect to its grant of powers to designated-and-assigned judges, was part of the Judicial Code prior to enactment in 1948 of the en banc statute.

Section 294, may be designated and assigned. Hence, it would follow from the acceptance of respondents' position that retired District Judge Leibell, who sat by designation and assignment on the panel decision below, was qualified to participate in each phase of the en bane proceeding here. The same would be true of a circuit judge from another circuit, sitting by assignment, or of an active district judge. We would think that even respondents would admit that Congress did not intend this result.

Respondents' attempt to analogize the en banc problem here with cases involving panel or trial court situations is also lacking in merit. The cases in the latter category to which they point involve solely the question of the validity of designation and assignment which, if present, clearly authorize judicial action in those instances.²² Designation and assignment here, however, affords no bridge to qualification in view of the explicit active service restriction of Section 46(c).²³

²² E.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 430 (C.A. 3); McDowell v. United States, 159 U.S. 596; United States v. Marachowsky, 213 F. 2d 235 (C.A. 7); Sunrise Mayonnaise v. Swift & Co., 88 F. Supp. 187, 189 (E.D. Pa.).

²³ There have been no decisions treating the precisely identical en banc issue posed in this case. It is true that two Ninth Circuit cases involved the same retirement factual pattern as presented here. In one, In re Sawyer, 260 F. 2d 189, 903, fn. 17, reversed, 360 U.S. 622, Chief Judge Denman presided at the oral argument of the case heard en banc. He retired between the date of hearing and the date of decision and thereupon withdrew from participation in the en banc decision. Judges Bone and Orr, on the other hand, participated in an en banc decision after retiring just prior to its rendition. Herzog v.

 Judge Medina's participation in the en banc decision below, contrary to the mandate of Section 46(c), renders that decision void

The participation of a retired circuit judge in the en banc decision in this case contrary to the controlling statutory provisions—a participation which tipped the scales and resulted in an overruling of the Second Circuit precedents in this field, Sword Line and American Eastern—rendered the en banc decision of July 28, 1958, void. This Court has consistently ruled that, whenever a judge acts beyond

United States, 235 F. 2d 664, 670, fn., certiorari denied, 352 U.S. 844. Neither of these decisions included any discussion on the issue presented under 28 U.S.C. 46(c).

The related question of whether a retired circuit judge (i.e., already retired before the three-judge panel hearing) may participate in the decision whether to rehear en banc under Section 46(c), has been answered in the negative by Chief Judge Duffy of the Seventh Circuit. G. H. Miller & Co. v. United States, 260 F. 2d 286, certiorari denied, 359 U.S. 907; United States v. Gordon, 253 F. 2d 177. In both of these cases, Judge Duffy ruled that retired Judge Major, who had been assigned to sit on the three-judge panel, could not participate in subsequent en banc proceedings under 28 U.S.C. 46(c). Judge Schnackenberg dissented on grounds similar to those adopted by the majority below. 260 F. 2d at 291-293.

In the only other reported decisions on this related issue of the right of a retired judge to vote for or against the grant of a petition for rehearing en banc, two Fifth Circuit cases appear inconclusive. Commercial Nat. Bank in Shreveport v. Connolly, 177 F. 2d 514; United States v. Sentinel Fire Ins. Co., 178 F. 2d 217. In both cases petitions for rehearing enbanc were denied per curiam. The four active circuit judges were evenly divided on whether the petitions should be granted. Judge Hincks, below, draws the inference that the fifth judge—retired Judge Sibley—must have voted for denial of that petition (R. 138-139). Judge Clark infers, however, that Judge Sibley did not participate and that the petitions were denied for lack of a majority in favor of granting (R. 140).

the powers conferred upon him by statute in a particular case, the decision rendered by him or in which he took part is a nullity. As a result, the invalid en banc determination below must be vacated and the cause remanded to the Second Circuit for further en banc proceedings.

In American Construction Company v. Jacksonville Railway, 148 U.S. 372, this Court was faced with the same issue of the effect on an appellate decision of participation in that decision by a judge allegedly rendered incompetent to vote by statute. There, Circuit Judge Pardee had taken part in a decree of the Circuit Court of Appeals reviewing an order setting aside an order originally entered by him as trial judge. The question, analogous to that here, was whether he was prevented from taking part in the appellate proceeding by virtue of statutory provisions barring participation by a judge in the review of causes upon which he sat as trier. This Court ruled in unequivocal fashion and in terms fully applicable here (148 U.S. at \$87):

* * If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiforari. * * *

Subsequently in Johnson v. Manhattan Ry. Co., 289 U.S. 479, the Court had occasion to consider whether applicable statutory provisions permitted a circuit judge to assign himself as trier of particular causes in the trial-court. The District Court ruled that the

statute conferred no such power on the appellate judge and that therefore, any action taken by him in a cause to which he had assigned himself was void. The Court of Appeals reversed, and its decision was upheld by this Court on the ground that the statute authorized such special assignment by the circuit judge. Had the Court found such statutory authority lacking, however, its opinion leaves no doubt that the result in the District Court would have been reestablished.

Finally, in Frad v. Kelly, 302 U.S. 312, the issue was once again before this Court: In that case a. district judge conducted a hearing and concluded a criminal proceeding by sentencing while sitting by designation and assignment in another district. After returning to his own district, he subsequently entertained a petition in the case for discharge from probation and termination of proceedings under provisions of the Probation Act. The question presented was whether such action was prohibited under other Probation Act provisions which assertedly limited the Authority to act to the judge of the district in which the proceeding was brought. The Court held that his: action was prohibited by statute, and, consequently, that the discharge from probation and termination of proceedings was a nullity. 302 U.S. at 316.

Similarly, state courts have consistently vacated judgments as void because of participation in that sjudgment by a judge rendered incompetent to take part in a specific proceeding by a statutory restriction. E.g., People v. Bork, 96 N.Y. 188; Watson v. Payne, 94 Vt. 299; Case v. Hoffman, 100 Wis. 314, 352-

358. In so holding, the controlling rule was expressed by the Vermont Supreme Court as follows (94 Vt. at 301):

[W] here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit of shall not act, or shall take no part in the decision [emphasis added], the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is coram non judice, and void:

And both the Vermont and Wisconsin Supreme Courts observed that, with regard to appellate tribunals, the rule was applicable whether or not, as here, the vote of the judge barred from participation by statute was decisive. Watson v. Payne, supra, at 301–302; Case v. Hoffman, supra, at 356–357.

In view of these decisions, any reliance by respondents on the theory that Judge Medina's participation in the én banc decision below was that of a 'de facto' judge, and hence valid, is wholly incorrect. The "de facto' principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question," or where, also unlike this situation, there

²⁴ See also, Case v. Hoffman, supra, at 352-358; People v. Bork, supra, at 199; In re Woodside-Florence Insigntion District, 121 Mont. 346, 358-359.

^{*}There is no dispute here over Judge Medina's status at the crucial moment of en banc decision: he was a retired, non-active judge. The only question presented, comparable to the questions in American Construction Company v. Jacksonville Railway. Johnson v. Manhattan Ry. Co., and Frad v. Kelly, supra, is whether as a retired judge on July 28, 1958, he had the power to decide this case under the provisions of 28 U.S.C. 46(c).

has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment. The "de facto" doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity, and the legislative prohibition of provisions like Section 46(c) would be completely undermined:

²⁸ E.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 430 (C.A. 3); Ball v. United States, 140 U.S. 118; Ex parte Ward, 173 U.S. 452; McDowell v. United States, 159 U.S. 596; United States v. Mcrachowsky, 213 F. 2d 235 (C.A. 7); Luhrig Collieries Co. v. Interstate Coal & Dock Cos. 287 Fed. 711 (C.A. 2); 144 A.L.R. 1207.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the en banc judgment below of July 28, 1958, is void and should be vacated and the case remanded for further proceedings to be held in conformity with the mandate of 28 U.S.C. 46(c) restricting the authority to act to active circuit judges of the Second Circuit.

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MARCH 1960. .

²⁷ Since the last valid order entered below was the decision to grant rehearing en bonc on December 19, 1957, the Second Circuit may now permit reargument of the cause en bonc and a new determination by the present active membership. On the other hand, it is within the power of the active judges on remand to determine that, as Jindges Clark and Waterman suggested below (R. 140), a judgment of affirmance of the district court decrees may now be entered based on the equally divided vote of the qualified en banc participants on July 28, 1958. See Case v. Hoffman, supra, at 359-360.

APPENDIX

28 U.S.C. 43 provides in pertinent part:

(b) Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 45 provides in pertinent part:

of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the circuit judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the circuit.

(d) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to

act, who is next in precedence.

28 U.S.C. 294 provides in pertinent part:

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such

^{&#}x27;The provisions of 28 U.S.C. 294 set forth above are those which were in effect on July 28, 1958, the date of the en banc decision here. See 28 U.S.C. 294 (1952 ed.—Supplement. V). Subsequent assendments were made in phraseology. See 28 U.S.C. 294/(1958 ed.).

judge for service within his circuit shall be made by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

Any retired judge of the Court of Claims (1) may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit as he is willing to undertake, and (2) may be called upon by the chief judge of the Court of Claims to perform such judicial duties in such court as he is willing to undertake.

(c) Any retired judge of any other court of the United States may be called upon by the chief judge of such court to perform such judicial duties in such court as he is willing to

undertake.

(d) The Chief Justice of the United States shall maintain a roster of judges who have retired from regular active service but who are willing and able to undertake special judicial duties from time to time, which roster shall be known as the Roster of Senior Judges. judge of the United States who has retired regular active service under 371(b) or 372(a) of this title but is willing and able to undertake special judicial duties from time to time either in a particular court or courts specified by him or generally in any court may-so indicate by requesting the Chief Justice of the United States to place his name upon the Roster of Senior Judges as available for such duty. The Chief Justice shall remove: from the Roster of Senior Judges the name of any such judge who is no longer willing or able to perform any judicial duties. Any retired judge whose name appears upon the Roster Senior Judges shall be known as a senior judge, and may be designated and assigned by the Chief Justice of the United States to perform such judicial duties as he is willing

to undertake in any court of the United States other than the Supreme Court, upon presentation of a certificate of necessity by the chief judge of such court.

(e) No retired justice or judge shall perform judicial duties except when designated and

assigned.

28 U.S.C. 295 provides in pertinent part:

No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief-judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of the Customs Court in active service shall be made without the consent of the thief-judge of such court.

28 U.S.C. 296 provides:

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for pub-

lication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, de-

As with Section 294, we have set forth the provisions of 28 U.S.C. 295 as they appeared on July 28, 1958, the date of the en banc decision. See 28 U.S.C. 295 (1952 ed.—Supplement V).

cide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. 332 provides in pertinent part:

The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

28 U.S.C. 333 provides in pertinent part:

The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. * * *

28 U.S.C. 371 provides:

(a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime continue to receive the salary which he was receiving when he resigned.

(b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serv-

ing at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

IN THE.

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, Petitioner,

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT AMERICAN FOREIGN STEAMSHIP CORP.

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April, 1960;

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, Petitioner,

V.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT AMERICAN-FOREIGN STEAMSHIP CORP.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York dated May 11, 1956 (R. 64) is reported as A. H. Bull Steamship Co. v. United States, 141 F. Supp. 58. The opinion of the three-judge panel of the Court of Appeals dated September 25, 1957 (R. 104), the opinion of the Court of Appeals on rehearing in banc dated July 28, 1958 (R. 115), and the opinion of the Court of Appeals denying the Government's Petition for Further Rehearing in banc dated March 26, 1959 (R. 137), are reported at 265 F. 2d 136, et seq.

- JURISDICTION

The jurisdictional requisites are adequately set forth in the brief for the United States.

OUESTION PRESENTED

Is an in banc decision of a court of appeals invalid because an active circuit judge of the circuit, who was a member of the court in banc, retired from regular active service after the case had been committed to the consideration of the court and thereafter participated in the court's decision.

STATUTES INVOLVED

28 U.S.C. 43(b) provides:

Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 46 provides:

- (a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
- (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.
 - (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

-(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum,

Relevant portions of other statutory provisions are set forth in the Appendix, infra, p. 49.

STATEMENT

1. Respondent's cause of action

Respondent is a steamship company which chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 in accordance with Section 5 of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738). Respondent is suing the Government under the Suits in Admiralty Act (46 U.S.C. 741, et seq.) because the Maritime Administration breached the Maritime Commission's agreement in Clause 13 of the charter to refund certain excessive preliminary payments of so-called "additional charter hire" upon the completion of final audit of respondent's account.

From June through August 1946, respondent had chartered certain war-built vessels from the War-Shipping Administration under a form of bareboat charter known as Warshipdemiseout Form 203 (R. 2/3). By Section 202 of the Act of June 8, 1946 (60 Stat. 481, at 501) the War Shipping Administration was abolished and its functions transferred to the United States Maritime Commission effective September 1, 1946. In the early part of August 1946, the Maritime Commission announced that it intended to

The chartering functions of the Maritime Commission were transferred to the Maritime Administration effective May 24, 1950 in accordance with Reorganization Plan No. 21 of 1950 (64 Stat. 1273, et seq.). See note set out under 46 U.S.C.A. 1111.

cancel all War Shipping Administration charters effective as of August 31, 1946. Thereafter vessels were to be chartered from the Maritime Commission under a new form of charter (Shipsalesdemise Form 303) which would contain a profit-sharing clause providing for the payment to the Commission, on a final basis, of so-called "addit and charter hire" on a sliding scale reaching as high as 90% of the cumulative net profit in excess of 10% per annum on capital necessarily employed (R. 19-20). This rate was in excess of the rate specified by Section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)). of one-half of the cumulative net profit in excess of 10% per annum on capital necessarily employed (R. 19-20).

Respondent and others similarly situated objected to paying the proposed additional charter hire on the sliding scale rate on the ground that it was illegal (R. 20). By way of compromise, the Commission, on the recommendation of its General Counsel, inserted in the proposed charter agreement a provision whereby the charterer agreed to make preliminary (rather than final) payments on account of additional charter hireunder the new charter (Shipsalesdemise Form 303) and to make preliminary payments/on account of additional charter hire that had accrued under the cancelled charter (Warshipdemiseout Form 203), as called for by the Commission, and whereby the Commission agreed to refund excessive preliminary payments of any additional charter hire made under each charter upon its final audit of the results of operations under such charter (R. 20). The proposed charter

² Section 5 (a) of the Merchant Ship Sales Act (50 U.S.C. App. 1738(e)) provides that Section 709 of the Merchant Marine Act, 1936 "shall be applicable to charters made under this section."

agreement was accordingly modified by adding the following paragraph to Clause 13:

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISE-OUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISE-OUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or finalaudit may show to be due, or such overpayments refunded to the Charterer as may be required." (R. 20).

Respondent and others similarly situated executed the charter agreement (Shipsalesdemise Form 303) with this modification included (R. 20) and the Maritime Commission and its successor, the Maritime Administration, reaffirmed by regulations, instructions and supplemental agreements its agreement in Clause 13 to refund to the charterer upon final audit any preliminary payments the charterer made in excess of the additional charter hire that the Maritime Administration was lawfully entitled to retain. In accordance with the agreement in Clause 13, and these regulations, instructions and supplemental agreements, respondent made, among others, a preliminary payment of \$327,-

³ Some, but not all, of these regulations and instructions are referred to in the in banc decision of the court below. (R. 121; see also R. 5-7).

730.16 on September 21, 1951 and a further preliminary payment of \$3,104.08 on September 21, 1953. These preliminary payments were made on account of additional charter hire under both the War Shippings Administration Form 203 charter and the Maritime Commission Form 303 charter. In accordance with instructions from the Maritime Administration, the principal preliminary payment was accompanied by a letter of transmittal stating:

This remittance is subject to adjustment upon the completion of final accounting between the American Foreign Steamship Corporation and the Maritime Administration and neither the tender of such payment by the American Foreign Steamship Corporation, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the lights or remedies of either party under the terms of the agreements involved or otherwise." (R. 18-19)

The Maritime Administration was required by law-to deposit all funds it received into the general funds of the Treasury, "miscellaneous receipts." The Maritime Administration did not, however, deposit the preliminary payments into the general funds of the Treasury but held them in a special unearned moneys account with the approval of the Comptroller General, because they "did not represent 'earned' moneys when first received" 33 Dec. Comp. Gen. 503, 504 (1954). Cf. Rosenman v. United States, 323 V.S. 658, 662.

These instructions are set out in a footnote to the in bane decision of the court below. (R. 121)

Section 12(d) of the Merchant Ship Sales Act provides:
"All moneys received by the Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts..." (50 U.S.C. App. 1745(d))

On October 21, 1954, respondent filed its final accounting of the results of its operations under each of the two charters and demanded that the excess preliminary payments be refunded to it on final audit of its accounts in accordance with the said provisions of Clause 13 (R. 7-8; 9-15). On November 3, 1954, Maritime, refused to return such overpayments on final audit in accordance with its agreement in Clause 13 (R. 8), and, on November 24, 1954 (Cert. R. 1a), suit was filed for the return of such overpayments in accordance with the said agreement. This suit, therefore, is for breach of contract.

Since these libels were not before this Court in Sword Line, they were not characterized in any way by this Court in that case.

Moreover, libelant's claim in Sword Line differed materially from respondent's claim here. If libelant in Sword Line had a claim for breach of contract, it did not assert that claim. On the contrary, it informed the Court of Appenls that

This reference and other references designated "Cert R" are to those parts is of the certified record filed herein which were not printed." In designating the record for printing, both sides stated that the parties may refer in their briefs or oral argument to any portions of the certified record filed in this Court which were not included in the printed record.

⁷ The Government errs in its assertion that "these libels for allegedly illegal assessment of additional charter hire were sharacterized as actions for unjust enrichment in this Court's decision in Sword Line, Inc. v. United States, 351 U.S. 976." (Govt. Brief, 6, fn. 5)

[&]quot;the instant suit is founded upon a statute and not upon a contract, maritime or non-maritime." (Petition for Rehearing, Sword Line, Inc. v. United States, No. 23723 in the Court of Appeals for the Second Circuit, at p. 3)

[&]quot;The implied obligation to repay, under the theory of money had and received or any other theory, rests upon the statute."

(Ibid., at p. 9)

Nor did Sword Line raise in this Court the question of whether it had a claim for breach of contract. In its Petition for Certiorari

2. The proceedings below

The Government, appearing specially excepted to the amended libel on the ground that

"This [District] Court lacks jurisdiction over the subject matter of this suit and over the re-

"(No. 861, October Term, 1955), Sword Line sought review of two questions which are material to this discussion. These questions expressly negated any claim for breach of contract. They were:

"1. Can a court of admiralty have jurisdiction over a claim for money unconscionably retained in violation of the provisions of an Act of Congress, although not in violation of a maritime contract.

"2. Roes admirally have jurisdiction over a suit in quasicontract for money had and received when there is an express maritime contract, but no breach thereof." (pp. 2-3)

Further, in the body of its Petition, it assured this Court:

"In the case at bar there was an express contract between Sword Line, Inc. and the United States but there was no breach of that contract." (p. 16)

The Government urged the granting of the writ of certifrari to review these questions, stating that

"The scope of quasi-contractual jurisdiction in admiralty appears in recent years to have given rise to extensive difficulties and misunderstandings." (Memerandum for the United States in No. 861, October Term, 1955, at p. 2)

This Court granted the writ and held per curiam?'

"Certiorari is granted limited to the question whether admiralty had jurisdiction over the controversy stated in the libel, and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a marriage contract." (351 U.S. 976)

In Webster v. Fall, 266 U.S. 507; 511, this Court said:

"Questions which merely lurk in the record, neither brought, to the attention of the Court nor ruled upon are not to be considered as having been so decided as to constitute precedents."

. Here the Government urges that a question which was negated in the questions presented to this Court on certiorari and which both parties expressly assured the Court did not "lurk in the record" was so decided as to constitute a binding precedent.

spondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745." (R. 17)

and moved the exception for hearing (R. 63).

The exception was sustained and the libel dismissed on authority of Sword Line, Inc. v. United States, 228 F. 2d 344, aff'd on rehearing, 230 F. 2d 75, aff'd per curiam as to admiralty jurisdiction, 351 U.S. 976, and American Eastern Corp. v. United States, 133 F. Supp. 11, aff'd, 231 F. 2d 664. District Judge Palmieri said:

"The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests." (R. 64)

The last of the chartered vessels had been redeligered on December 28, 1949 (R. 3). The preliminary payments were made on September 21, 1951 and September 21, 1953 (R. 18-19). The District Court therefore held that it lacked jurisdiction and dismissed the amended libel because it found that the payments were voluntarily made, an issue which was not before the court on the Government's motion, which respondent did not know the court was entertaining, and concerning which it was given no opportunity "to secure and present evidence." Cf. Washington ex rel. Ore R. & N. Co. v. Fairchild, 224 U.S. 510, 524-25, and Morgan v. United States, 304 U.S. 1, 18-19.

On appeal, a three judge panel of the Court of Appeals consisting of Circuit Judges Medina and Hingks, and District Judge Leibell, affirmed on authority of Sword Line and American Eastern, although the court in an opinion written by Judge Hingks, expressed doubts as to the correctness of those decisions. It said:

"If the subject matter of these appeals were res nova, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the court. On the authority of Sword Line and American Eastern we hold that these libels also were barred." (R. 112)

Rehearing in bane was granted on December 19, 1957. On rehearing the Government contended for the first time that "final audit" in Clause 13 was used in the sense of "annual audit," claiming that the word "each," appearing before the words "final audit" in one place in the clause showed that more than one "final audit" was contemplated (R. 123-124).

Respondent and other, appellants pointed out that Clause 13 required a charterer to make preliminary payment on account of additional charter hire not only on vessels operating under Maritime Administration Shipsalesdemise Form 303 but also

"on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner."

Clause 13 provided that payments under both charters were deened to be preliminary and subject to adjustment "upon the completion of each final audit." The words "each final audit" therefore plainly referred to the final audit of operations under each of the two charters (Cert. R. 395a-97a). It was pointed out to the court that this was the practical construction of Clause 13 by the parties and that the Government had contended, twenty two days before submitting its brief on rehearing in the court below, in the United States District Court for the District of Delaware, that a single final audit of all operations under the charter and not an annual audit was intended by Clause 13 (Cert. R. 344a-46a).

The majority of the court (Judges Hincks, Medina and Moore) in an opinion again written by Judge Hincks, held that inasmuch as the preliminary payments on account of additional charter hire were made pursuant to the charter agreement and specifically Clause 13 thereof, the rights of the parties depended upon that clause; that Clause 13 provided for the refund of overpayments upon the completion of final audit; and that consequently libelant's cause of action arose at that time. As to the Government's contention that the words "final audit" were intended to

SThis Court has several times held that the interpretation of a statute by Government representatives responsible for its administration is entitled to great, if not controlling weight (Faucus Machine Co. v. United States, 282 U.S. 372, 378) orwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315; Bowles v Seminole Rock & Sand Co., 325 U.S. 410, 413-14) and the Court of Claims has applied this principle to the interpretation of contracts by Government representatives responsible for their administration: See Central Engineering and Construction Co. v. United States, 103 C. Cls. 440, 465 (1945); Houston Ready-Cut House Co. v. United States, 119 C. Cls. 120, 187-88 (1951).

mean "annual audit", the court thought that the language of the clause prima facre supported libelant's view. However, since the issue had not been raised in the District Court and since it apparently depended upon facts "alleged in briefs and affidavits," some but not all of which were part of the record in the District Court, the cases were remanded and the issue "submitted to the trial judges for findings and determination after giving the Government an opportunity to raise such issues of fact as may be desired" (R. 124).

The court concluded that "all [claims] were reserved by Clause 13 until 'final audit' whatever that term shall be determined to mean' (R. 125), and said that insofar as Sword Line and American Eastern were inconsistent with its decision, they were overruled. The court did not pass upon the Government's contention that the preliminary payments were voluntary payments because the court said this was an "issue going to the merits" and not germane to the question of jurisdiction (R. 122). Cf. Binderup v. Pathe Exchange, 263 U.S. 291, 304-05.

Chief Judge Clark and Judge Waterman dissented in separate opinions. Both Judges said that the court should not have overruled the Sword Line and American Eastern decisions. Judge Clark, in a separate opinion in which Judge Waterman concurred, added that the Government's contention that "final audit".

The Government has apparently abandoned the contention made in its brief on rehearing in the court below that "final audit" was used in Clause 13 in the sense of "annual audit." Its answer, filed in the District Court on August 25, 1959, one year after the in bane decision of the court below, does not allege that the words "final audit" in Clause 13 were intended to mean "annual audit".

meant "annual audit" should have been accepted "without fairly conclusive support" for the libelant's interpretation of those words; and that the remand was improper because he assumed that all evidence on this point had already been submitted to the District Court. He said:

"It is, indeed, a reflection upon able and shrewd counsel [for the libelants] to believe that, faced with the legal requirement and practical necessity of disclosure they should have held back relevant and convincing material." (R. 129)

Judge Clark overlooked the fact that the Government raised this issue for the first time on rehearing in the Court of Appeals and that, as the majority pointed out, the parties had no occasion to present evidence thereon before that time: (R. 123-124)

Judge Clark also raised the question now before the Court in this case. Although he regarded the continued participation of retired judges "in cases committed to their consideration desirable and beneficial all around" (R. 135). Judge Clark expressed doubt as to the authority of Judge Medina under 28 U.S.C. 46(c) to participate in the court's in banc decision after his retirement from regular active service. The Government petitioned for further rehearing in banc principally on this ground. The petition was denied, the court dividing at it had in deciding the case on rehearing in banc.

The majority held that there was nothing in the 1948 Judicial Code which prevented Judge Medina, who was a member of the duly constituted court in banc, from participating after retirement in its decision. The court said:

"Nothing in the Code requires that the court of appeals, when once constituted according to law, whether in banc or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member, of the court thereafter retiring or to include an active member of the court thereafter appointed." (R. 138)

The court also pointed out:

"Moreover, § 43(b) of the Code of 1948 provides: 'Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.' This provision is not stated to be exclusive of the 'judges designated or assigned' to hear and determine a case as member of a court in banc. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in \$46(b) and to judges designated and assigned unider §§ 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a member of the court in banc was competent even after his retirement to sit under (R. 139) and 296." (R. 139)

In a separate statement Judges Clark and Waterman dissented from the view expressed by the majority, although they expressed "doubt as to the ultimate wisdom of the policy" of excluding retired judges from participating in decisions of such cases which they felt compelled to advocate under their interpretation of Section 46(e). (R. 140)

3. The petitions for writs of certiorari

On June 23, 1959, the Government filed its petition in No. 138 for a writ of certiorari limited to the question of whether Judge Medina was disqualified by 28 U.S.C. 46(c) from participating in the in bane decision of the court below. Respondent opposed the issuance of the writ, and filed a conditional crosspectition presenting the substantive issues in No. 322.

On October 19, 1959, the Court granted the Government's petition for a writ of certiorari. (R. 142) The Court has taken no action with regard to respondent's conditional cross-petition presenting the substantive issues in No. 322.

SUMMARY OF ARGUMENT

The decision of the court below is valid because:

1. Section 46(c) does not, as the Government claims, provide that cases in bane must be heard and determined by active circuit judges of the circuit. The purpose of Section 46 is to empower a court of appeals to convene itself into divisions, three-judge courts or in bane and to distribute its work among its members in the courts so convened (Western Pacific Railroad Case, 345 U.S. 256, 257-58). The requirement that an in bane court "shall consist of all active circuit judges of the circuit" plainly refers to the constitution of the court at the time it is convened. There is nothing in the section that prohibits judges from participating in decisions of cases which were committed to their consideration as members of a court in bane before they retired.

Courts of appeals in every circuit in which judges have retired under the present Judicial Code have per-

¹⁰ We do not mean to imply that a court of appeals may not add to a court in bane at the time it is convened other justices or judges competent to sit as judges of the court. This question, however, is not involved in this case, since Judge Medina, when assigned to the court in bane, was an active circuit judge of the circuit.

mitted them to participate in decisions of cases which they heard prior to the time they retired either as a member of a three-judge court or, when the question has arisen, as a member of a court in banc. Similarly, so far as we have been able to ascertain, every court that has considered the matter has permitted a judge. whose term of office has ended under the peremptory terms of a jurisdictional statute, to participate thereafter in the determination of cases which he heard during his term of office. This practice is based upon the assumption that a legislature, in regulating the jurisdiction of a court, does not intend capriciously to interfere with its orderly and effective administration by requiring the court to pause in its consideration of a submitted case in order to reconstitute itself either to omit a former member or to add a member newly appointed. Shore v. Splain, 258 Fed. 150 (C.A.D.C.); Cf. Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326.

2. The Government's argument that this practice should not be applied in this case does not bear ananlysis. The Government says that the "express provisions" and underlying policy of Section 46(c) preclude Judge Medina's participation in the in bane decision after he retired. (Govt. Brief, 10) The "express provisions" of Section 46(c) do not preclude his participation therein; nor does its underlying policy.

The Government says that the testimony in hearings in 1941 before a subcommittee of the Senate Committee on the Judiciary, hereinafter called the "Senate Subcommittee Hearings" (Govt/Brief, 18-19), and a supposed statutory prohibition against the consideration by retired circuit judges or district judges of

petitions for rehearing in bane from panel decisions in which they participated (Govt. Brief, 12, 17, 23), show a Congressional purpose to exclude such judges from participation in in bane proceedings.

If such a purpose existed, it would not, of course, extend to prohibiting a retired circuit judge from participating in the decision of a case which had been committed to his consideration as a member of an in bane court before he retired. (See 1, above.) There is, however, no such Congressional purpose.

The Senate Subcommittee Hearings show that it was contemplated that a court of appeals might call district judges to sit with the court in bane under suitable circumstances. This Court held, in the Western Pacific Railroad Case, 345 U.S., at 263, 267-68, that a court of appeals could assign the entire function of initiating a rehearing in banc to the panel, consisting of two district judges and one circuit judge, which had originally heard the case. Moreover, the rationale of Textile/Mills Sec. Corp. v. Commissioner, 314 U.S. 326,—that judges competent to sit as judges of a court of appeals were competent to sit with the court in bane-was consciously affirmed in Section 43(b) of the present Judicial Code when Congress made all justices and judges designated or assigned to a court of appeals competent, without qualification, "to sit as judges of the court." See Reviser's Note to Section 43(b) (28 U.S.C.A. 43(b), note).

The court below, therefore, was plainly right when it said that Section 43(b) supported its conclusion "that Judge Medina, who under § 46(c) was designated and assigned as a member of the court in bane was competent even after his retirement to sit under § 43(b), 294(b) and 296." (R. 139)

3. If Judge Medina's participation in the in banc decision was not authorized by law, he was a de facto judge whose judicial acts were as valid and as binding upon litigants as those of a de jure judge. Ex Parte Ward, 173 U.S. 452; Ball v. United States, 140 U.S. 118; Manning v. Weeks, 139 U.S. 504.- His status cannot be brought into question by the Government in its simulated role of private litigant, but only by the Government as sovereign in an action in the nature of quo warranto to restrain Judge Medina from asserting the judicial authority which the Government now claims he lacks. Johnson v. Manhattan R. Co., 289 U.S. 479, 502. This principle is the more insistent in this case because his retired status did not affect the Government's right to a fair, orderly, or convenient hearing of the appeal. Cf. American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U.S. 372; Johnson v. Manhattan R. Co., 289 U.S. 479; Frad v. Kelly, 302 U.S. 312.

ARGUMENT

I. JUDGE MEDINA WAS COMPETENT UNDER THE TERMS OF THE STATUTE TO PARTICIPATE IN THE DECISION OF THE COURT BELOW BECAUSE HE WAS A MEMBER OF THE COURT WHEN THE CASE WAS COMMITTED TO ITS CONSIDERATION

Section 46(c) does not, as the Government contends (f. vt. Brief, 10-14), provide that cases in bane must be heard and determined by active circuit judges of the circuit.

Section 46 provides in material part:

- "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
- . "(b) In each circuit the court may authorize the hearing and determination of cases and con-

troversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

This section authorizes a court of appeals, i.e., the active circuit judges of the circuit, to convene itself into divisions, three-judge courts, or in banc, and to distribute its work among its members in the courts so convened.

This Court explained:

"In this Section, Congress speaks to the Courts of Appeals: the court, itself, as a body, is authorized to arrange its calendar and distribute its work among its membership; the court, itself, as a body, may designate the places where it will sit. Ordinarily, added Congress, cases are to be heard by divisions of three. But Congress went further; it left no doubt that the court, by a majority vote, could convene itself en bane to hear or rehear particular cases." (Western Pacific Railroad Case, 345 U.S. 256, 257-58)

This section refers to the times the courts are convened, the judges are assigned and the work is distributed. The requirement that a court in bane "con-

^{1/28} U.S.C. 43(b) provides in pertinent part:

[&]quot;Each court of appeals shall consist of the circuit judges of the circuit in active service."

sists of all active judges of the circuit" refers to the constitution of the Court at the time it is convened.12

There is nothing in the statute which suggests that a member of an in bane court who has participated in the court's consideration of a case is divested of judicial competency to participate in its decision because he retires from regular active service before that decision is reached. There is nothing in the statute which suggests that an active member of the court who is appointed after a case has been committed to the court's consideration must participate in its decision. This was the view of the court below. It said:

"Since Judge Medina was a member of the court in banc which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once con-

¹² We do not mean to imply that a court of appeals may not add to a court in bane at the time it is convened other justices or judges competent to sit as judges of the court. See pp. 33-37, infra. This question, however, is not involved in this case, since Judge Medina, when assigned to the court in bane, was an active circuit, judge of the circuit.

¹³ On pages 12-13 of its brief, the Government implies that Judge Medina's retirement on March 1, 1958 occurred after the petition for rehearing in bane had been acted upon, "but prior to the hearing or determination on the merits." This implication that he retired prior to the hearing is doubtless an inadvertence. On March 1, 1958, when Judge Medina retired, the case on rehearing had already been committed to the consideration of the court under the terms of the order granting rehearing in bane. (R. 114) As the Government points out on page 9 of its brief, the question before this Court is whether circuit judges "who, like Medina here, retire subsequent to en banc hearing but prior to en banc determination" may participate in in bane decisions.

stituted according to law, whether in banc or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed." (R. 138)¹⁴

This is also the view of all other courts of appeals before which similar questions have arisen in in bane cases. It conforms to the practice of courts of all cine cuits in three-judge court cases and to the practice of all courts under various jurisdictional statutes.

A. In Banc Cases

The only other cases involving the question presented in this case arose in the Ninth Circuit. Questions identical in principle arose in two cases in the Fifth Circuit and one case in the Third Circuit.

The Ninth Circuit cases are Herzog v. United States, 235 F. 2d 664, 670, fn., cert. denied, 352 U.S. 844, and In Re Sawyer, 260 F. 2d 189, 203, fn. 17, rev'd on other grounds, 360 U.S. 622. In both of these cases the Ninth Circuit conformed to the views of the court below.

In Herzog v. United States, supra, the status of Judges Bone and Orr was precisely the same as that of Judge Medina in this case. As members of the court in bane, they heard argument in the case, there-

The dissenting judges in the court below recognized the importance to effective judicial administration of the principle pronounced by the major. They said they regarded the continued participation of retired judges "in cases committed to their consideration desirable and beneficial all around", and expressed their "doubt as to the ultimate wisdom of the policy" of excluding retired judges who had heard in bane cases from participation in the decisions of such cases, which they thought Section (4)(c) required them to advocate. (R. 135, 140)

after retired from regular active service, and subsequently participated in the court's in banc decision. (235 F. 2d at 670, fn.)

In In Re Sawyer, Judge Denman, after he had heard argument in the case as a member of the court in banc, retired and was succeeded by Judge Hamlin before a decision in the case was reached. The court did not suspend its judicial task either to exclude Judge Denman or to include Judge Hamlin. It is true that Judge Denman did not participate in the in banc decision. The court carefully explained, however, that this was because he thought it "inappropriate" to do so. (260 F. 2d, at 203, fn. 17.) The explanation lacked point unless the court assumed that retired Judge Denman was competent to participate in its in banc decision if he had chosen to do so.

The Fifth Circuit cases are Commercial Nat. Bank in Shreveport v. Connolly, 176 F. 2d 1004, petition for rehearing in banc denied, 177 F. 2d 514, and United States v. Sentinel Fire Ins. Co., 178 F. 2d 217, petition for rehearing in banc denied, 178 F. 2d 239. At the time these cases arose there were six active circuit judges in the Fifth Circuit. One of them, Judge Lee, did not participate in either case. (177 F. 2d, at 515; 178 F. 2d, at 219.) The cases were heard and decided in banc by Judge Sibley and the other four active circuit judges. Subsequently Judge Lee died and Judge Sibley retired. Judges Russell and Borah were appointed to succeed them. Thereafter, petitions

Judge Denman retired July 3, 1957, and Judge Hamlin took the judicial oath on April 16, 1958 (Legislative History of the United States Circuit Courts of Appeals, Senate Committee on the Jadiciary, 85th Cong., 2d Sess., at p. 141.) In Ke Sawyer was decided June 9, 1958 (260 F. 2d 189).

for rehearing in bane were filed in both cases. In conformity with the views of the court below, the Fifth Circuit Court of Appeals did not in either case "reconstitute itself ofther to exclude" Judge Sibley, who had retired, "or to include" Judges Russell and Borah, who had been appointed. The petitions for rehearing in bane were denied per curiam by the court consisting of retired Judge Sibley and the four other judges who had constituted the court in bane on the original hearing with two of these judges dissenting. (177 F. 2d at 514; 178 F. 2d at 239.)

The Third Circuit case is Bishop v. Bishop, 257 F. 28 495. There Judge Magruder, then an active circuit judge of the First Circuit, sat by designation in the Third Circuit and participated in an in banc decision denying rehearing in banc. The case supports the decision of the court below.

B. Three-Judge Cases

In ten of the eleven circuits judges have retired since the enactment of the present Judicial Code. In each of these circuits those judges have been permitted to participate in the decision of the cases committed

The Government says that Judge Magruder participated only in a denial of a rehearing by the panel. (Govt. Brief, 19, Fn. 17) The report of the case shows that it was an in Lanc decision per curiam "before BIGGS, Chief Judge, and MARIS, MAGRUDER and STALEY, and HASTIE, Circuit Judges" (257 F. 2d, at 501). More than three judges cannot sit on a Court of Appeals except in bane (28 U.S.C. 46(d)). Five judges, of course, constituted a quorum (28 U.S.C. 46(d)) of the in bane court in the third circuit since that court is composed of seven active circuit judges (28 U.S.C. 44(a)). Moreover, Chief Judge Biggs and Judge Hastie, who dissented were not members of the panel which originally heard the case (257 F. 2d 496). Judges do not dissent from decisions of panel courts to which they are not assigned.

to their consideration as members of three-judge courts before they retired.¹⁷

28 U.S.C. 294(e) provides that "No retired justice or judge shall perform judicial duties except when designated and assigned." The participation of retired circuit judges in the decision of cases they heard prior to their retirement, like the participation of former judges in decisions of cases they heard during their term of office, does not depend upon any subsequent grant of judicial authority.

Judge Medina participated after his retirement in decisions of at least 36 such cases (in 20 of which the Government was a party), without any designation or assignment after he retired. Judge Magruder similarly participated in at least 18 decisions of such cases without any designation or assignment after he retired.¹⁸

Cases in the ten circuits are collected in the Appendix, infra, p. 50.

¹⁸ Judge Medina retired on March 1, 1958. On July 28, 1958, the date of the in bane decision of the court below, he had not been designated or assigned to perform any judicial duties. Between March 1, 1958 and July 28, 1958, he participated in at least 36 decisions of cases he had heard before March 1, 1958. These cases are listed in the Appendix, infra, pp. 51-52.

Judge Magrider retired on June 12, 1959. On November 5, 1959 he had not been designated or assigned to perform any judicial duties. (See Goldfine et al. v. United States, No. 396, this Term, Reply Brief by Petitioners to Brief for the United States in Opposition to Petition for a Writ of Certiorari, p. 8, fn. 1.) Between June 12, 1959 and November 5, 1959, he participated in at least 18 decisions of cases he had heard before June 12, 1959. These cases are listed in the Appendix, infra, pp. 53-54.

The Government in its Petition for Further Rehearing En Banc in the court below, explained this practice:

"Having retired, Judge Medina of course still remained a circuit judge. Booth v. United States, 291 U.S. 339 (1934); United States v. Moore, 101 F. 2d 56 (2d Cir. 1939), cert, denied 306 U.S. 664 (1939), 28 U.S.C. 371 (b). He remained fully competent to sit as one of three judges in the ordinary case, 28 U.S.C. 43(b), 294(b). By virtue of his assignment before his retirement for the original hearing and determination of ordinary cases by a division of the Court of Appeals, he continued assigned and competent to participate in the divisional decision of those cases after retirement." (Cert. R. 521)

In this Court, the Government has apparently changed its views. It argued in its Petition for Certiorari (pp. 10-11) and suggests in its Brief (pp. 23, 26-28) that a retired circuit judge, in order to participate in the decision of a case he heard as a member of a court of appeals before he retired, must receive a designation or assignment from the Chief Judge of the court after he retires, and that, in the absence of such a designation or assignment, the decision in which he participated is void.

Adopting the Government's argument in its Petition for Certiorari in this case, Petitioners in Goldfine & Paperman v. United States, No. 396, this Term, now ask this Court to reverse the affirmation of their conviction by the Court of Appeals for the First Circuit. They point out that the Goldfine case was argued on May 13, 1959 and decided on July 24, 1959, with an opinion by Judge Magruder, who had retired from

the court on June 12, 1959 and had received no designation or assignment thereafter.¹⁹

The Government's present position and that of Petitioners in the Goldfine case cannot be sustained. It would overrule the practice of all of the courts in all circuits and probably invalidate hundreds of past decisions.

When an appellate judge has heard cases and consulted with his colleagues on the issues involved in those cases and thereafter retires, his right to participate in the decision of each of such cases cannot be made to depend on the approval of one of his colleagues. A judge must perform his judicial duties as a matter of right, not of grace.

¹⁹ Goldfine et al. v. United States, Reply Brief, pp. 8-12. Hetitioners in the Goldfine case, argue:

[&]quot;In his petition in American-Foreign Steamship Corp. et al., supra, the Solicitor General himself acknowledges that a formal designation under 28 U.S.C. § 296 is required to authorize a retired judge to sit. The Solicitor General represents to this Court as follows (Pet. for Cert., pp. 10-11):

^{&#}x27;Moreover, the powers conferred on retired judges under 28 U.S.C. 296 are solely those conferred by the Chief Judge of the circuit. Following his retirement, Judge Medina did not receive a designation and assignment in this case. Plainly, Chief Judge Clark did not purport in any way to invest Judge Medina with the power to participate in the en banc decision.'

[&]quot;The Solicitor General also maintains (and we believe correctly) that 'The issue is one of statutory interpretation; it is not a matter of discretion.' (Pet. for Cert., p. 7, United States v. American-Foreign Steamship Corp., of al.) The foregoing contentions by the Solicitor General apply precisely to the present case.

[&]quot;We submit that the judgment by the Court of Appeals is void because rendered by an improperly constituted court, that certiorari should be granted, and the judgment should be reversed." (Ibid., pp. 11-12)

C. Cases Arising Under Other Jurisdictional Statutes

Judges, whose authority has ended under jurisdictional statutes, are always permitted to participate in deciding cases they heard while they had judicial authority.

In Shore v. Splain, 258 Fed. 150, the Court of Appeals of the District of Columbia, after examining several state, jurisdictional statutes similar to its own, pointed to its own practice and said:

"In the event of a vacancy in this court on account of the absence of one of its members, the remaining members are authorized to designate a justice of the Supreme Court of the district to sit in his place 'while such vacancy * * * shall exist.' . Code Between the submission of a case and its: final disposition weeks may intervene, and if during that period the justice whose place the additional justice had taken must remain away from the court, although ready to act, it would greatly impede the dispatch of the public business here. Ever since the organization of the court it has been the practice for the additional justice to participate in the opinions and judgments in cases argued before the court while he was on the bench. although the regular justice whose place he had been appointed to fill had returned to his duties before the judgments were announced. The right of the additional justice to do so has never been questioned by any one so far as we know." (258 Fed., at 153; emphasis supplied.)

Although the language of the jurisdictional statutes under which the judge's authority to act is terminated is typically mandatory,20 courts imply an exception

²⁰ Examples of such statutes are: A temporary judge may sit a "until such disability be removed or vacancy filled" and "while such vacancy . . . shall exist" (Shore v. Splain, 258 F&d., at 152-53); "such appointment [of a temporary judge] shall not continue for a longer period than the absence or disability of the police judge" (Smith v. Sullivan, 33 Wash. 30, 34, 73 Pac. 793 (1903). Cases involving similar statutes are collected in Shore v. Splain, 258 Fed., at 152-53.

as to pending cases.²¹ They refuse to impute to the legislature, in regulating the jurisdiction of courts, a capricious intention to interfere with their effective and orderly administration by requiring courts to suspend their deliberations in cases committed to their consideration, either to exclude a member whose term of office has expired or to include one newly appointed.²²

This principle has been reiterated in a series of cases. See Heydenfeldt v. Daney Gold & Silver Min. Co., 93 U.S. 634, 638; Church of The Holy Trinity v. United States, 143 U.S. 457 pLau Ow Bew v. United States, 144 U.S. 47, 59; Bird v. United States, 187 U.S. 118, 124; Hawaii v. Mankichi, 190 U.S. 197, 212-15. It was applied by this Court to the construction of the former Judicial Code in Textile Mills Sec. Corp. v. United States, 314 U.S., at 334. Citing Hawaii v. Mankichi, the Lau Ow Bew and Bird cases, the court in Shore v. Splain applied this same principle to its refusal to construe a jurisdictional statute under which a judge's authority had ended to preclude him from deciding cases committed to his consideration during his term of office. (258 Fed., at 152)

²¹ Shore v. Splain, 258 Fed. 150 and cases cited therein; State extel. Jugler v. Gover, 102 Utah 459, 132 P. 2d 125 (1942); see also United States extel. Paetau v. Watkins, 164 F. 2d 457, 459-60 fn. 1 (2d Cír); Cheesman v. Hart, 42 Fed. 98, 105-6 (Cir. Ct. Colo.); Sunrise Mayonnaise, Inc. v. Swift & Co., 88 F. Supp. 187, 188-89 (E.D. Pa.); Johnson v. Bussey, 95 S.W. 2d 990 (Tex. Civ. App. 1936); Peterson v. Finnegan, 45 N.D. 101, 176 N.W. 734 (1920); State extel. Hodshire v. Bingham, 218 Ind. 490, 33 N.E. 2d 771 (1941). This principle, of course, does not apply to the determination of new matters which arise out of a case after it has been decided. See Frad v. Kelly, 302 U.S. 212, 317.

²² In United States v. Kirby, 7 Wall. 482, 486-87, this Court said:

[&]quot;All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases should prevail over its letter."

II. THE UNDERLYING POLICY OF 28 U.S.C. 46(c) DOES NOT, AS THE GOVERNMENT CONTENDS, PRECLUDE JUDGE MEDINA'S PARTICIPATION IN THE IN BANC DECISION OF THE COURT BELOW

The Government's conclusion that the underlying policy of Section 46(c) precludes Judge Medina's participation in the decision (Govt. Brief, \$5-20) is without foundation.

The Government bases this conclusion upon a supposed Congressional purpose to exclude judges, other than active circuit judges of the circuit, from all in bane proceedings which it alleges is indicated in the Senate Subcommittee Hearings (Govt. Brief, 19); and upon a supposed statutory prohibition against the consideration by retired circuit judges and district judges of petitions for rehearing in bane from panel decisions in which they participated (Govt. Brief, 12, 17, 23).

If such a Congressional purpose did exist, it would not apply to preclude a retired ercuit judge from participating in the decision of a case which had been submitted to his consideration as a member of a court in banc before he retired. (See pp. 18-28, supra.) There is, however, to such Congressional purpose.

A. The Senate Subcommittee Hearings

The Senate Subcommittee Hearings do not indicate such a purpose. They are, of course, hearings on a bill which did not become law. To the extent that they indicate the purpose of Congress seven years later when it included Section 46(c) in the 1948 Revision of the Judicial Code, they show that the purpose was not to exclude judges, other than active circuit judges of the circuit, from an in banc court, but to assure that all active-circuit judges of the circuit would be included in such a court. Throughout the hearings,

the desirability of permitting the court to call in district judges to sit on the court in bane was .ecognized both by the judges who testified and by the Senators before whom they testified.

In those hearings the question arose in connection with the desirability of avoiding an evenly divided court in cases heard in banc in circuits which had an even number of judges. The following testimony is pertinent:

"Mr. Chandler [representing the Administrative Office of the U. S. Courts]. I would like to say for the information of Judge Parker and Chief Justice Groner, if I may, that question was raised at the meeting last Monday, and it was also raised in an inquiry to me from the Bureau of the Budget, and I answered the Bureau of the Budget, and I made the same statement here, that recognizing that if the circuit court of appeals consisted of an even number of judges the result might be that if all the judges sat there would be an even division and no majority, yet the judgment of the Judicial Conference seemed to be pretty clear that if the court was constituted of more than three judges it should be constituted of all the active and available judges. While the conference had not considered this particular matter, I thought it would be contrary to their view that an even division should be avoided by selecting some number of the court less than all if more than three merely in order to get an odd number; that is, if a majority was obtained by eliminating in good faith one judge from participating in the decision, then I thought one of the purposes of this bill would be lost.

"Judge Parker. Unless there is something in the bill which forbids it, I think it would be perfectly feasible for the judges to call in a district judge to sit in the court, in the hearing in that case.

"Senator Kilgore. Why should not it be made a provision of the bill?

"Judge Parker. I am inclined to think it should be." 23

The testimony of Mr. Chandler was, as he said, a repetition in substance of testimony he had given before the Subcommittee a few days before. At that time, Senator McFarland suggested that provision be made to permit the court to call in a district judge to sit with it in banc (Hearings, at pp. 14-15).

B. The Supposed Statutory Prohibition

There is no statutory prohibition against the consideration by retired circuit judges or district judges of petitions for rehearings in bane from panel decisions in which they participated. In the Western Pacific Railroad Case, this Court held that a court of appeals, that is, the active circuit judges of the cir-

²³ Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054, and H.R. 138, 77th Cong., 1st Ses. at p. 41. At the time of these hearings legislation was necessary, as Judge Parker indicated, to chable a district judge to sit on a court in bane because under Section 120 of the former Judicial Code (28 U.S.C. (1940 ed.) 216) a district judge was competent to sit on a court of appeals only to make up a three-judge court. Textile Mills Sec. Corp. v. Commissioner, 314 U.S., at 333, fr. 13. In the present Code this restriction on the competency of district judges was removed. See 28 U.S.C. 296 and the Reviser's Note to the second sentence thereof (28 U.S.C.A. 296, hote),; see also 28 U.S.C. 43(b) and the Reviser's Note thereto (28 U.S.C.A. 43, note). It is significant that Judge Parker was Judicial Consultant to the Judiciary Committee of the House of Representatives which supervised the 1948 revision of the Judicial Code (28 U.S.C.A, at p. xx).

cuit,²⁴ could assign the *entire function* of initiating a rehearing in banc to the panel consisting of one circuit judge and two district judges who had originally heard the case. (345 U.S., at 263, 267-268)

Moreover, retired judges and district judges probably participate in more than one-third of all three-judge decisions of courts of appeals.²⁵ These decisions are final in all but a very few cases. The administration of justice in the Federal courts plainly requires that decisions by such courts have the highest degree of prestige. Mr. Justice Frankfurter has said:

"Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. Yet one who has paged the Federal Reporter for nearly fifty years is struck with what appears to be a growth in the tendency to file petitions for rehearing in the courts of appeals. I have not made a quantitative study of the facts, but one gains the impression that in some circuits these petitions are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes

^{24 28} U.S.C. 43(b) provides in pertinent part:

[&]quot;Each court of appeals shall consist of the circuit judges of the circuit in active service."

²⁵ Chief Judge Lumbard testified on February 29, 1960 that during 1959, 34 per cent of the work of the Second Circuit was performed by retired circuit judges and other designated and assigned circuit and district judges, and that during 1958, 40 per cent of the work of the court was performed by such judges. (Hearings on H.R. 6159 before Succommittee No. 5, House Committee on the Judiciary, 86th Cong., 2d Sess., at pp. 195-196.) We were advised by the Administrative Office of the United States Courts that 2,705 cases were disposed of in all of the courts of appeals during 1959, that counting the hearing by one judge as one time on the panel, retired judges sat 571 times and district judges sat 690 times.

in defeated litigants and wastes their money. If petitions for rehearing were justified, except in rare instances, it would be peak serious defects in the work of the courts of appeals, an assumption which must be rejected. It is important to bear this in mind in approaching 28 USC § 46(c) that section is directed at those relatively few instances which call for rehearings, though again rarely, in the nine courts of appeals that sit in panels.

"Rehearings en banc by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern." (Western Pacific Railroad Case, concurring opinion, 345 U.S., at 270.)

Nothing could be more likely to diminish the prestige of three-judge courts in which retired circuit judges or district judges sit, and to encourage lateral appeals from their decisions by way of petitions for rehearings in bane than to overrule the Western Pacific Railroad Case and accept the Government's contention that Section 46(c) forbids a court of appeals from calling on retired circuit judges or district judges to participate in determining whether their decisions on panels should be reheard by the court in bane. Nothing could be less likely to resolve conflicts satisfactorily between panels upon which those judges sit and other panels in the same circuit.

Finally, in assuming that Congress intended to prohibit a court of appeals from assigning any function in connection with rehearings in banc to retired circuit judges or district judges, the Government overlooks the decision in *Textile Mills Sec. Corp.* vs. Commissioner, 314 U.S. 326, and its reaffirmation in Section

43(b) of the present Judicial Code. In Textile Mills, this Court rejected the literal limitation of a court of appeals to three judges under Section 117 of the former Judicial Code²⁶ because some circuits had more than three circuit judges and also because the Chief Justice and Circuit Justices were competent to sit as judges of the court under the former Section 120.²⁷

The Court said:

"In this connection it should be noted that Section 120 of the Judcial Code, 28 U.S.C.A. § 216,

²⁶ Section 117 of the former Judicial Code provided:

[&]quot;There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established." 28 U.S.C. (1940 Ed.) 212.

²⁷ Section 120 of the former Judicial Code provided:

[&]quot;The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the gircuit court of apheals, he shall preside. In the absence of such Chief Justice, or\associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one of more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may. have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." 28 U.S.C. (1940 Ed.) 216.

makes the 'Chief Justice and associate justices of the Supreme Court assigned to each circuit... competent to sit as judges of the circuit court of appeals within their respective circuits.' Thus while the circuit court of appeals is composed primarily of circuit judges, the circuit justice is made a 'component part' of that court." (314 U.S., at 331, fn. 11)

This Court equated competency to sit as a judge of the court with competency to participate in its most important function, the decision of cases. The Court held that judges competent to sit as judges of the court were component parts thereof and competent to sit with the court in bane. (314 U.S., at 333)

Section 43(b) now provides that:

"The circuit justice and justices or judges designated or assigned shall also be competent to sit as Judges of the court."

The Reviser's Note to the present Section 43(b) explains that the purpose of redrafting Section 117 of the former Judicial Code was to confirm that designated and assigned justices and judges were now component parts of the court within the meaning of the Textile Mills case, and as fully competent as the Chief Justice and circuit justices had been at the time of the Textile Mills decision, either to sit on the court constituted as a three-judge court or as a court in banc. The Reviser's Note states:

"The provision of Section 212 of Title 28 U.S.C., 1940 Ed., for a three-judge court of appeals was permissive and did not limit the power of the court to sit in bane. Thus, subsection (b) reflects

present status of law, and analy, that court is composed of not only circuit judges of the circuit in active service, of whom there may be more than three, but the circuit justice or justices and judges who may be assigned or designated to the court. (See Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 1942, 62 S. Ct. 272, 314 U.S. 326, 86 L. Ed. 249 and Reviser's Notes under Section 46 of this title.)"

We therefore do not agree with the Government's assumption that when Congress said without qualification

28 The pertinent changes in the "status of law" since the Textile Mills decision were:

(1) The Act of December 29, 1942, 56 Stat. 1094 authorized the assignment of active and retired circuit judges from one circuit to another and amended Section 14 of the former Judicial Code to provide:

"Each circuit judge designated and assigned to serve temporarily as a circuit judge in another circuit may and shall, during the period of his assignment, exercise all the judicial powers and discharge and perform all the judicial futies of and be subject to the same assignments of duties as the circuit judges of the circuit to which he is designated and assigned for temporary duty." (28 U.S.C. (1940 ed.) 18)

(2) The limitation on the competency of district judges to sit on the court of appeals (see p. 31, fn. 23, supra) was removed by providing in the first paragraph of Section 296 of the 1948 Revision:

"A justice or judge shall discharge, during the period of his desgination and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned."

The Reviser's Note to this section explains:

"The second sentence of the revised section was substituted for the provision of said section 18 [of Title 28, U.S.C., 1940 ed.] which subjected circuit judges to the same assignments of duty as the circuit judges of the circuit to which they are designated and assigned. The revised section extends this requirement and makes it applicable to all designated and assigned judges." (28 U.S.C.A. 296, Note)

in Section 43(b) of the Judicial Code that "justices or judges designated or assigned shall also be competent to sit as judges of the court" it intended that the effect should be the same as if it had expressly prohibited such justices or judges from participating in any way in in banc proceedings. The court below was plainly right when it said:

"Moreover, § 43(b) of the Code of 1948 provides: 'Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.' This provision is not stated to be exclusive of the 'judges designated or assigned' to hear and determine a case as members of a eout in banc. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in § 46(b) and to judges designated and assigned under & 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a member of the court in banc was confpetent even after his retirement to sit under δδ 43(b), 294(b) and 296." (R. 139)

III. THE DECISION OF THE COURT BELOW IS VALID WITHOUT REGARD TO JUDGE MEDINA'S STATUTORY COMPETENCY TO PARTICIPATE THEREIN

The Government in its simulated role of private litigant²⁹ cannot question Judge Medina's competency to continue to perform judicial duties as a member of the court in bane after he retired from regular active

²⁹ The libel herein was filed under the Suits in Admiralty Act, 46 U.S.C. 741, et seq. Section 3 of that act provides that "such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private Farties." (46 U.S.C. 743) See also United States v. Isthmian Steamship Co., 359 J.S., 314, 324.

service. The Government was not deprived of any of its rights as a litigant because Judge Medina chose to retire from regular active service before the court's decision was reached. His vote against the Government would undoubtedly have been the same had he refrained from retiring until the case was decided. The Government had the right to a fair hearing on the appeal; it was not deprived of this right because it lost. 30

Judge Medina did not participate in the in banc decision as a mere usurper. He continued to hold the office of circuit judge of the Court of Appeals not-withstanding his retirement from regular active service. Booth v. United States, 291 U.S. 339, 350-351. He participated in the decision in good faith under color of the authority of the office he held. He par-

³⁰ In a strikingly similar case, the Supreme Court of Utah unanimously held that one of its members who was on leave of absence in military service was authorized to cast a decisive vote in a case he heard before he left the court. The concurring opinion emphasized that the rights of the unsuccessful litigant were in no way prejudiced.

[&]quot;It is not contended that either taking the oath as an army officer or cotrance upon active active military duty in any way actually interfered with, colored, or otherwise prejudiced the deliberations of Justice Pratt or influenced him in concurring with the views of the Chief Justice and, Mr. Justice Larson. Nor is it claimed that Justice Prath who was then at Fort Douglas adjacent to Salt Lake City for any practical reasons was unable to give adequate time to deliberations and consultations with other members of this court to determine how the case should be decided. In fact, it must be conceded that the same result would have been achieved as far as the majority opinion and the dissenting views are concerned, whether or not any leave of absence had been granted, or whether or not Justice Pratt ever had been called to active duty in the armed forces." State ex rel. Jugler v. Grover, 102 Utah 459, 461: 132 P. 2d 125 (1942)

ticipated therein under his assignment under Sections 46(a) and 46(c) of the Judicial Code, as a member of the court in banc. Under color of the same authority and under similar assignments under Sections 46(a) and 46(b) of the Judicial Code before he retired, he participated in decisions of 36 pending cases (in 20 of which the Government was a party), which were decided between the time of his retirement and the time of the in banc decision.³¹

A judge, who continues in good faith to perform judicial functions after his statutory authority has expired, is a de facto judge and his decisions are as valid and binding upon litigants as those of a de jure judge. Balt v. United States, 140 U.S. 118, 128-29; United States v. Marachowsky, 213 F. 2d 235, 244-45 (7th Cir.), cert. denied 348 U.S. 826; Sylvia Lake Co. v. Northern Ore Co., 242 N.Y. 144 (1926), cert. denied 273 U.S. 695; State ex rel. Jugler v. Grover, 102 Utah 459, 462 (1942); Shore v. Splain, 258 Fed. 150 (C.A. D.C.). Cf. Waite v. City of Santa Cruz, 184 U.S. 302, 322-24.

The cases the Government cites (American Construction Co. v. Jacksonville T.&K.W.R. Co., 148 U.S. 372; Johnson v. Manhattan R. Co. 289 U.S. 479; Frad. v. Kelly, 302 U.S. 312) do not support its claimed privilege to attack the decision of the court of appeals in this case on the basis of Judge Medina's supposed lack of judicial competency to participate in its decision.

None of these cases, except the Johnson case, involved a question similar to the one involved in this case, and all de facto judge cases, namely: whether

³¹ These cases are listed in the Appendix, infra, pp. 51-52.

a litigant may challenge a judgment of a court by a collateral attack on the competency of a judge who participated therein to perform judicial duties.³² The Johnson case supports our views on this point, not the views of the Government.

Each of these cases involved the question of whether a litigant could challenge a judgment by attacking the action taken by a judge in alleged violation of a statute or rule of court designed to assure to litigants a fair, impartial, or convenient hearing.

In Johnson v. Manhattan R. Co. the appointment of a receiver by Judge Manton was attacked on two grounds material to this discussion: First, that Judge Manton lacked judicial competency to sit on the district court in the case because, as senior circuit judge, his appointment of himself to perform such judicial duties in the district court was void; Second, that Judge Manton had improperly exercised his authority as a circuit judge assigned to the district court by hearing an application for the appointment of a receiver and appointing a receiver in violation of the rules of the district court which provided:

"1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.

"'11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes

³² An attack on a decision of a court based upon the alleged incompetency of a member thereof is a collateral attack upon the court's authority. See Norton v. Shelby County, 118 WaS. 425; United States v. Alexander, 46 Fed. 728 (D.C. Idaho, 1891); State, ex rel. Jugler v. Grover, supra. Cf. Johnson v. Manhattan R. Co, 289 U.S. 479.

and any other causes (except a receiver in bank ruptcy may be appointed by a referee as provided in the Bankruptcy Rules); shall be made to the judge assigned (meaning assigned by the District Judges in their division of business]³³ to hold the Bankruptcy and Motion Part of the business of the court and to no other judge. (289 U.S., at 485.)

The first question—whether Judge Manton lacked judicial competency to sit on the District Court—was similar to the question presented in this case. This Court held that Judge Manton's judicial competency was not open to collateral attack by litigants, and explained:

"And were it so open, no litigant could with any safety submit any matter to an assigned judge—a situation which would involve intolerable uncertainty and embarrassment to both public and private interests.

"In the course of his opinion the District Judge suggested that the assault on the assignment and on the Senior Circuit Judge's authority to act under it 'sounded in quo warranto,' and so might possibly be regarded as being direct rather than collateral. But the suggestion was ill-grounded. Quo warranto is addressed to preventing a con-. tinued exercise of authority unlawfully asserted. not to a correction of what already has been done under it or to a vindication of private rights. It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for there is no statute delegating to an individual the right to resort to it. Besides, such a proceeding, to reach its objective in a situation like that here disclosed, must be brought against the person

^{• 33} The bracketed phrase was supplied by the Court.

who is charged with exercising an office or authority without lawful right. The Johnson suit was not against the judge acting under the assignment, but was wholly between others who were private litigants. So, granting that an attack in a quo warranto proceeding would have been direct, and not merely collateral, it must be held that the suit before the District Judge was not such a proceeding." (289 U.S., at 501-502)

This is precisely the view we take in this case.

The second question—the right to attack the legality of the action taken by Judge Manton—is not material to the question presented here. We note, however, that this Court made reference to the fact that at the time the receiver was appointed,

"the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed upon careful consideration and with the utmost impartiality." (289 U.S., at 505)

that in disregarding the District Court rules

"he [Judge Manton] acted hastily and, evidently with questionable wisdom." (Ibid.)

and that

"This action has embarrassed and is embarrassing the receivership." (Ibid.)

Under those circumstances, the litigants, whose substantive rights depended upon the administration of the receivership, certainly had standing to question the legality of the actions which embarrassed its administration.

In Frad v. Kelly, there was no question concerning the competency of Judge Inch to perform judicial

duties in the United States District Court for the Eastern District of New York, the court in which the challenged action was taken. The question was whether a district judge of that court could hold hearings, sign orders and supervise from there a probationary proceeding pending in the Southern District of New York. Judge Inch was not and did not purport to be either a judge of the Southern District of New York or assigned to that district; nor had he been sitting there, under any assignment, for twent, months when he took the challenged action. He based his action squarely upon an alleged right under the Act of March 3, 1911 because he had formerly been assigned to the District Court of the Southern District of New York and, while there, had tried and sentenced the probationer in the case out of which the probation proceedings arose.34

³⁴ In Leary v. United States, 268 F. 2d 623, the defendant argued, on much the same grounds as the Government argues here, that his conviction was illegal because Frad v. Kelly prohibited the judge from presiding in the case before the effective date of his assignment. The Government, in the Leary case, argued that the conviction was valid. The court agreed with the Government and held that the presiding judge was a de facto if not a de jure judge. It distinguished Frad v. Kelly upon the same basis that we have in this case. The court said:

[&]quot;Thus in the Frad-case, a judge who had once been a regularly designated judge in one district and had decided a case therein, attempted to decide, in another district in which he regularly sat), a new matter arising in the same case. He purported to act on a mafter in a district where such matter was not then pending. This differs from the instant case where the assigned judge proposed to act in, a matter which was then properly within the court's subject matter jurisdiction." (268 F. 2d, at 627; emphasis supplied by the court.)

We agree with the views of the court and of the Government in the Leary case.

This Court held that Judge Inch had no such right under the statute and pointed to the serious inconvenience that would ensue to the Government as a litigant, if the practice were permitted. The Court said:

"To hold that a judge of another district, merely because he had temporarily sat at the trial and conviction of a defendant and imposed sentence, could, from that other district supervise, extend, modify or terminate the probation, would be to ignore the intent of the law. It would moreover result in confusion and inconvenience in the administration of the probation act. It would mean that the United States Attorney and his assistants, and a probation officer of the court in which the judgment is recorded, would be required to go to distant parts to be heard upon the merits of any application by the probationer and that the probationer, at his will, could institute proceedings either before a judge of the court in which his conviction is recorded or the judge in a different district who had been a temporary member of that court. Such a possibility was certainly never intended." (302 U.S., at 318)

The situation in Frad v. Kelly is unlike the situation here. Judge Medina was a circuit judge of the Court of Appeals for the Second Circuit at the time the in banc decision was rendered. (Booth v. United States, 291 U.S., at 350-351); he purported to act as a judge of that court under an assignment from that court to participate in its in banc decision. The Government suffered no inconvenience by reason of his having done so.

In American Construction, no question was involved as to the competency of the judge to perform judicial functions in the court in which he sat. To assure to

appellants an unprejudiced hearing on appeal, Congress had provided that no circuit judge should sit on a circuit court of appeals to hear an appeal from a decision he made. If the judge violated this statute, the appellant had not received a hearing on appeal in accordance with the standards of fairness Congress had prescribed. The appellant plainly had standing to attack the court's judgment on this ground.

The Government does not here contend that Judge Medina's participation in the in banc decision in alleged violation of Section 46(c) resulted, as in American Construction, in its not receiving a hearing on the appeal in accordance with standards of fairness prescribed by Congress, or as in Johnson, that the court, in permitting Judge Medina to participate in its in banc decision, "acted hastily and with questionable wisdom" and that its action "embarrassed and is embarrassing" proceedings in the case. On the contrary, even the dissenting judges regarded the "confinued participation [of retired judges] in cases committed to their consideration [as] desirable and beneficial all around" (R. 135) and expressed "doubt as to the ultimate wisdom of the policy" of excluding such judges from in banc decisions which they thought Section 46(e) required them to advocate. (R. 140) Nor was the Government here, as in Frad v. Kelly, put to any inconvenience in presenting its case because of the alleged unlawful action.

The Government urges that it may attack the judgment of the court below because, in its opinion, Judge Medina's participation in the in banc decision frustrated the purpose of in banc proceedings. (Govt. Brief, 15-18) If Judge Medina's participation in the

case frustrated the purpose of in banc proceedings, it was a public purpose, not a private purpose, that was frustrated, and a public wrong, not a private wrong, that was perpetrated. The remedy was specific and exclusive—an action brought against him by the Government as sovereign in the nature of quo warranto to restrain him from exercising the judicial authority that the Government now alleges he lacked. (See Johnson v. Manhattan R. Cô., 289 U.S., at 502)³⁵ The law does not encourage unsuccessful litigants to search for defects in the judicial competency of judges who decide cases against them.

It does not matter, therefore, whether or not Judge Medina was legally authorized to exercise the judicial authority he assumed. So long as he was not restrained from its exercise in a quo, warranto proceeding in which he was a party, his official acts were binding upon litigants. Ex Parte Ward, 173 U.S. 452; Ball v. United States, 140 U.S. 118; Manning v. Weeks, 139 U.S. 504. See also Norton v. Shelby County, 118 U.S. 425, 441; McDowell v. United States, 159 U.S. 596.

The principle is explained in Norton v. Shelby County, 118 U.S.; at 441-442.

"The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and neces-

Appendix, infra, pp. 55-56, all recognize this principle either implicitly or explicitly. For examples of explicit statements see Anderson v. Marton, 21 App. D.C. 444, 449-50 (1903); Curtin v. Barton, 139 N.Y. 505, 511-12, 34 N.E. 1093 (1893); Commonwealth v. Distasio, 297 Mass. 347, 351, 8 N.E. 2d 923 (1937); Desmond v. McCarthy, 17 Iowa 525, 527 (1854); State ex rel. Madden v. Crawford, 207 Ore. 76, 90, 295 P. 2d 174 (1956).

sity, for the profection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question."

It is universally applied to judges.36

The entire administration of justice depends upon its preservation.

"The supremacy of the law could not be maintained or its execution enforced if the acts of a judge having colorable but not a legal title were to be deemed invalid." (Sylvia Luke Co. v. Northern Ore Co., 242 N.Y. 144, 147 (1926), cert. denied, 273 U.S. 695.)

³⁶ This principle has been applied to judges by this Court in Ex Parte Ward, 173 U.S. 452; Ball v. United States, 140 U.S. 118; Manning v. Weeks, 139 U.S. 504, and by courts of appeals of seven circuits and the District of Columbia. Shore v. Splain, 258 Fed. 150, 153 (C.A.D.C.); Luhrig Collieries Go. v. Interstate Coal & Dock Co., 287 Fed. 711, 713 (2d Cir.); cert. denied, 262 U.S. 751; Pwo Guys from Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 430, fn. 1 (3d Cir.); Sharfsin v. United States, 265 Fed. 916, 917-18 (4th Cir.); Sykes v. Sanford, 450 F. 2d 205 (5th Cir.); Enited States v. Marachowsky, 213 F. 2d 235, 244-45 (7th Cir.); cert., denied, 348 U.S. 826; Morris v. United States; 19 F. 2d-131, 133 (8th Cir.); Leary v. United States, 268 - F. 2d 623, 627 (9th Cit.). Cases from forty-five States, the thene ferritories of Alaska and Hawaii, Canada and England in which , courts have applied or expressly approved the application of the principle to judges are collected in the Appendix, infra, pp. 55-56.

The decision of the court below, therefore, should be affirmed without regard to the question presented in the Government's petition.

CONCLUSION

For the foregoing reasons, the judgment of the court below should in all respects be affirmed.

Respectfully submitted.

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April, 1960.

APPENDIX

28 U.S.C. 294(d) provides:

No retired justice or judge shall perform judicial duties except when designated and assigned.

28 U.S.C. 296 provides:

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall like all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justile or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

Retired judges participated in the decisions of the following cases which were submitted to their consideration as members of a three-judge court before they retired:

DECISION37

JUDGE (AND DATE OF RETIREMENT)

Boston Mutual Lij. Ins. Co. v. Insurance Agents Internat'l Union, 268 F. 2d 556 (1st Cir.), heard June 2, 1959 and decided July 22, 1959

Chief Judge Magruder (June 12, 1959)

French v. Gibbs Corporation, 189 F. 2d 787 (2d Cir.), heard May 1, 1951 and decided June 7, 1951

Chief Judge Hand (June 1, 1951)

Makowsky v. Povlick, 262 F. 2d 13 (3d Cir.), heard Nov. 20, 1958 and decided Jan 2, 1959

Judge Maris (Dec. 31, 1958)

British Transport Commission v. United States, 230 F. 2d 139 (4th Chr.), heard Jan. 7, 1956 and decided Feb. 13, 1956

Judge Dobie (Feb. 1, 1956)

American Motorists Insurance Co. Trinity
Universal Insurance Co., 240 M, 2d 67
(5th Cir.), heard Dec. 5, 1956 and decided Jan. 18, 1957

Judge Borah (Dec. 31, 1956)

Niagara Fire Insurance Co. v. Bryon & Hewgley Inc., 195 F. 2d 154 (6th Cir.), heard Nov. 27, 1951 and decided Mar. 14, 1952

Chief Judge Hicks
(Mar. 1, 1952)

Bennett v. United States, 231 F. 2d 465 (7th Cir.), heard Feb. 10, 1956 and decided April 4, 1956

Chief Judge Major (Mar. 23, 1956)

A. E. West Petroleum Co. v. Atchison, T. & S.F. Ry. Co., 212 F, 2d 812 (8th Cir.), heard Dec. 1, 1953 and decided May 4, 1954

Judge Thomas (May 1, 1954)

Monge v. Smyth, 229 F. 2d 361 (9th Cir.), heard Oct. 25, 1955 and decided Jan. 17, 1956 Judge Orr (Jan. 1, 1956)

McMul ns v. Kansas, Oklahoma & Gulf Ry. Co., 229 F. 2d 50 (10th Cir.), heard Nov. 15, 1955 and decided Jan. 10, 1956 Chief Judge Phillips (Jan. 1, 1956)

³⁷ Dates of oral argument when not shown in the reports were obtained from the Clerks of the respective courts.

Decisions in Which Judge Medina Participated, Without Any New Designation or Assignment, Between March 1, 1958, the Date of His Retirement, and July 28, 1958, the Date of the In Banc Decision of the Court Below

CASE	CASE HEARD	
Perlman v. Commissioner of Internal Revenue, 252 F. 2d 890	Feb. 6, 1958	Mar. 4, 1958
Vermont Structural State Co. v. Tatko Bros. State Co., 253 F. 2d 29	Feb. 4, 1958	Mår. 6, 1958
Riegelman's Estate v. Commissioner of Internal Revenue, 253 F. 2d 315		Mar. 10, 1958
United States v. Paradise, 253 F. 2d 319	Feb. 7, 1958	Mar. 26, 1958
Maher v. Isthmian Steamship Co., 253 F. 2d 414		
In re New Haven Clock & Walch Co., 25 2d 577	Jan. 15, 1958	Mar. 28, 1956
In re Allen N. Spooner & Sons, Inc., 253 F. 2d 584	Nov. 18, 1957	Mar. 10, 1958
New York Credit Men's Adjustment Bureau, Inc. v. Samuel Breiter & Co., 253 F. 2d 675*	Jan. 13, 1958	Mar. 25, 1958
United States v. 15.03 Acres of Land, \$253 F. 2d 698	Feb. 5, 1938	Apr. 2, 1958
Norda Essential Oil & Chemical Co. v. United States, 253 F. 2d 700	Nov. 7, 1957	Jan. 31, 1958
Rehearing denied Lewis v. Commissioner of Internal Revenue, 253 F. 2d 821	Dec. 11, 12, 1957	Apr. 14, 1958 Apr. 7, 1958
Excelsior Hardware Co. v. John Han- cock Mut. L. Ins. Co., 254 F. 2d 6		Apr. 7, 1958
Frasier v. Public Service Interstate Trans. Co., 254 F. 2d 132	Jan. 17, 1958	Apr. 16, 1958
Bennett v. The Mormacteal, 254 F. 2d 138	•	
United States ex rel. Farnsworth &. Murphy, 254 F. 2d 438	•	Apr. 15, 1958
United States v. Palmiotti, 254 F. 2d 491	Dec. 4 9, 1957	Apr. 18, 1958

7	CASE	HEARD	HEARD DECIDED	
Monteiro v. las, S.A	Sociedad Mar. San Nic ., 254 F. 2d 514	o- Jan. 14, 15, 1958	Apr. 14, 1958	
Murray v. 1 Co., 255	New York, N. H. & H.	R. Feb. 5, 1958	May 5, 1958	
Roth v. Uni	ited States, 255 F. 2d 4	40 Apr. 30, 1958	May 22, 1958	
United Stat 2d 491	es v. A-1 Meat Co., 255	F. Feb. 4, 5, 1958	May 23, 1958	
	tes v. Eastport Steamsh 255 F. 2d 795	ip Nov. 6, 1957	May 6, 1958	
Grace Line, F. 2d 8	Inc. v. United States, 2	55 Nov. 6, 1957	May 6, 1958	
Isthmian S States,	Steamship Co. v. Unite 255 F. 2d 816	ed Nov. 6, 1957	- May 6, 1958	
Isbrandtsen F. 2d 8	Co. V. United States, 2	55 Nov. 6, 1957	May 6, 1958	
United Stat	es v. Beard, 256 F. 2d 7	6 Feb. 7, 1958	May 23, 1958	
	ommissioner of Internate, 256 F. 2d 533	al Feb. 4, 1958	June 18, 1958	
Hight w. Ur	nited States, 256 F. 2d 7	95 Jan. 16, 1958	June 18, 1958	
Wagman v.	Arnold, 257 F. 2d 272	Feb. 6, 1958	June 13, 1958	
United Stat	es v. Ross, 257 F. 2d 292	Feb. 4, 1958	July 2, 1958	
Smith v. Si 2d 328	nclair Refining Co., 257	F. Feb. 7, 1958	July 7, 1958	
	New York, N. H. & H. 7 F. 2d 733	R. Feb. 3, 1958	July 7, 1958	
Georgia-Pa	cific Corp. v. United Stated Corp., 258 F. 2d 124		July 1, 1958	
Atalanta Trade	rading Corp. v. Feder Commission, 258 F. 2d 3		July 28, 1958.	
N. L. R. Corp.,	B. v. Adhesive Production 258 F. 2d 403	ets Jan. 15, 1958	July 3, 1958,	
Deep Sea	Tankers, Limited v. T Branch, 258 F. 2d 757	he Dec. 10, 11, 1957	July 14, 1958	
	California Tanker Co., 2	60 Nov. 8, 1957	Apr. 7, 1958	

Decisions in Which Judge Magruder Participated Without Any New Designation or Assignment Between June 12, 1959, the Date of His Retirement, and November 5, 1959

Cases:	HEARD ³⁸	DECIDED
Eagle of Gloucester, Inc. v. Consolidated Fisheries, Inc., 268 F. 2d		
Boston Mutual Life Ins. Co. v. Insur- ance Agents International Union, 268 F. 2d 556	June 2, 1959	July 22, 1959
N.L.R.B. v. New England Upholstery Co., 268 F. 2d 590 Reheaving denied		July 8, 1959 July 28, 1959
Connolly v. Farrell Lines, Inc., 268 F. 2d 653	May 12, 1959	July 22, 1959
Raybestos-Manhattan, Inc. v. Texon, Inc., 268 F. 2d 839 Rehearing denied		July 29, 1959 Aug. 26, 1959
Goldfine v. United States, 268 F. 2d 941 Rehearing denied	May 13, 1959	Aug. 24, 1959
Kelley v. Hansen, 268 F. 2d 947	June 3, 1959	July 28, 1959
Fournier v. Goyzalez, 269 F. 2d 26	Feb. 3, 1959	July 29, 1959
Griffin Wellpoint Co. v. Munro-Lang- stroth Inc., 269 F. 2d 64	Apr. 8, 1959	July 31, 1959
Tessier v. United States, 269 F. 2d	May 15, 1959	July 31, 1959
Oskoian v. Canuel, 269 F. 2d 311	June 4, 1959	Aug. 3, 1959
Merchants National Bank v. Morriss 269 F. 2d 363) .	14 4
American Auto Insurance Co. v. United States, 263 F. 2d 406	Mar. 3, 1959	9 July 24, 1959

³⁸ Dates of oral argument were obtained from the Clerk, United States Court of Appeals for the First Circuit.

.CASES:

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	V. Unite	ed States,	269 F. 2	d June	5, 1	959	Aug.	27,	198
688	7	Rehear	ing denie	d			Sept.	15	195
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Aro Mfg Rep	. Co., Inc locement	Co., nve	rtible To	p June	4, 1	959	Aug.	31,	195
United S	States v.	Praught,	270 F. 2	d May	13, 1	959	Aug.	31,	195
Schell v.	Ford-M	otor Co.,	270 F. 2	d June	3, 1	959	Sept.	.1,	195
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³⁸ Dates of oral argument were obtained from the Clerk, United States Cour of Appeals for the First Circuit.

Cases approving the application of the de facto principle to judges

STATE COURTS:

Mayo v. Stoneum, 2 Ala. 390 (1841)

Keith v. State, 49 Ark. 439, 5 S.W. 880 (1887)

Matter of Danford, 157.Cal. 425, 108 Pac. 322 (1910)

Butler v. Phillips, 38 Colo. 378, 88 Pac: 480 (1906)

State v. Carroll, 38 Conn. 449 (1871)

State ex rel. Atty. Gen. v. Gleason, 12 Fla. 190 (1868)

Merchants and Planters Bank v. Citizens Bank of Hazlehurst, 147 Ga 366, 94 S.E. 229 (1917)

State v. Nolan, 31 Idaho 71, 169 Pac. 295 (1917)

People ex rel. Ballou v. Bangs, 24 Ill. 184 (1860)

Hiday v. Statg, 64 Ind. App. 159, 115 N.E. 601 (1917)

Desmond v. McCarthy, 17 Towa 525 (1854)

State v. Roberts, 130 Kan. 754, 288 Pac. 761 (1930)

Orme v. Commonwealth, 21 Ky. L. Rep. 1412, 55 S.W. 195 (1900)

State v. Sanderson, 169 La. 55, 124 So. 143 (1929)

Woodside v. Wagg, 71 Me. 207 (1880)

Kimble v. Bender, 173 Md. 608, 196 Atl. 409 (1938)

Commonwealth v. DiStasio, 297 Mass. 347, 8 N.E. 2d 923 (1937)

People v. Butkewicz, 223 Mich. 35, 193 N.W. 879 (1923)

Burt v. Winona & Peter R. Co., 31 Minn. 472, 18 N.W. 285 (1884)

Powers v. State, 83 Miss. 691, 36 So. 6 (1903)

State v. Miller, 111 Mo. 542, 20 S.W. 243 (1892)

Ex Parte Parks, 3 Mont. 426 (1880)

Ex Parte Johnson, 15 Neb. 512, 19 N.W. 594 (1884).

Mallett v. The Uncle Sam Gold & Silver Mining Co., 1 Nev. 188 (1865

State v. Boiselle, 83 N.H. 339, 143 Atl. 704 (1928)

Byer v. Harris, 77 N.J.L. 304, 72 Atl. 136 (1909)

Switz v. Middletown Township, 40 N.J. Super. 217, 122 A. 2d 649 (1956

State v. Blancett, 24 N.M. 433, 174 Pac. 207 (1918)

Nelson v. People, 23 N.Y. 293 (1861)

Curtin v. Barton, 1/39 N.Y. 505, 34 N.E. 1093 (1893)

Sylvia Lake Co. v. Northern Ore Co., 242 N.Y. 144, 151 N.E. 158 (1926)

State v. Lewis, 107 N.C. 967, 12 S.E. 457 (1890)

Youmans v. Hanna, 35 N.D. 479, 161 N.W. 797 (1917)

Stiess v. State, 103 Ohio St. 33, 132 N.E. 85 (1921)

Sheldon et al. v. Green, 182 Okla. 208, 77 P. 2d 114 (1938)

State ex rel. Madden v. Crawford, 207 Ore. 76, 295 P. 2d 174 (1956)

Clark v. Commonwealth, 29 Pa. 129 (1858)

Angell v. Steere, 16 R.I. 200, 14 Atl. 81 (1888)

Cromer v. Boinest, 27 S.C. 436, 3 S.E. 849 (1887)

Bergh v. Gibbs, 57 S.D. 634, 234 N.W. 616 (1931)

Beaver v. Hall, 142 Tenn. 416, 217 S.W. 649 (1919)

Snow v. State, 134 Tex. Crim. Rep. 263, 114 S.W. 2d 898 (1938)

State ex rel. Jugler v. Grover, 102 Utah 459, 132 P. 2d 125 (1942)

McGregor v. Balch, 14 Vt. 428 (1842)

McCraw v. Williams, 74 Va. 510 (1880)

State v. Fountain, 14 Wash. 236, 44 Pac. 270 (1896)

State ex rel. Sommers v. Dowell, 82 W. Va. 240, 95 S.E. 861 (1918)

In Re Burke, 76 Wis. 357, 45 N.W. 24 (1890)

TERRITORIAL COURTS:

Wilder v. Colburn, 21 Hawaii, 701 (1913)

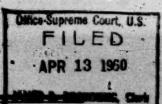
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, Petitioner

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

Oh Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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Washington 5, D. C.

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Of Counsel.

April 13, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, Petitioner

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

INTRODUCTORY

The brief for the United States adequately cites the opinions below, the jurisdictional requirements of this Court, and the relevant statutes. These matters are therefore not repeated herein.

This brief is submitted on behalf of respondents Stockard Steamship Corporation; A. H. Bull Steamship Co., New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; T. J. Stevenson & Co., Inc.; North Atlantic and Gulf Steamship Co.; Luckenbach Steamship Company, Inc.; Blidberg Rothehild Co., Inc.; Fall River Navigation Co. A separate brief is being filed on behalf of respondent American-Foreign Steamship Corporation.

QUESTION PRESENTED

As a circuit judge, who (a) heard an appeal as a member of a three-judge panel; (b) participated in the decision of the court to grant a petition for rehearing en bane; (c) was a member of the en bane court; but (d) retired after the case was submitted on briefs, qualified to participate in the en bane decision thereafter released; or does such retirement require a reconstitution of the en bane court for further rehearing.²

STATEMENT

1. The nature of the litigation.

Respondents are steamship owners and operators who, after World War II, chartered Government-owned merchant vessels from the Maritime Commission ("Maritime") under the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735 et seq., and under section 709(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1199(a), as amended.

The charter hire paid to the Government by respondents consisted of two elements. One was called "basic hire," payable irrespective of profits or losses and computed at 15 per cent per annum of the sales price of

² The Government's petition for certiorari (p. 11) referred to United States v. Silverman, 248 F. 2d 671, 696 (2 Cir., 1957), cert. denied 355 U.S. 942, and its brief on the merits (p. 20, n. 17) refers to United States v. United Steel Workers of America, 271 F. 2d 676 (3 Cir., 1959), affirmed 361 U.S. 39. No retired judge participated in either of these cases either in panel or en banc and their citation by the Government suggests that there is an issue in this case as to the eligibility of a retired judge to participate in en banc proceedings in a case with the consideration of which he has had no prior connection. This is not correct. Respondents do not urge that in such a situation a retired judge is eligible to participate in en banc proceedings.

each vessel. The second element was termed "additional charter hire," which was fixed by section 709(a) of the 1936 Act at 50 per cent of the "cumulative net voyage profits" earned in excess of a return of 10 per cent upon the capital required to operate the vessels.

In 1946, before the chartering program was inaugurated, Maritime proposed rates of "additional charter hire" on a sliding scale basis ranging from 50 to 90 per cent of profits, in lieu of the 50 per cent fixed by section 709(a). Respondents objected to the sliding scale proposal because it was at variance with the terms of the statute (R. 19, 120-121). The chartering program was nevertheless commenced, but the parties agreed in Clause 13 of the charter3 that payments of additional charter hire should be made "at such times and in such manner and amount as may be required" by Maritime and should be preliminary and subject to adjustment and refund upon final audit by Maritime of the charterer's accounting. Maritime deposited the preliminary payments in an "Unearned Moneys" suspense account (R. 21-23).

Accountings for the profits and losses from vessel operations were submitted by the charterers and preliminary payments of additional charter hire were

³ Clause 13 provided in part:

The Charterer agrees to make preliminary payments to the Owner... at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deeined to be preliminary and subject to adjustment either at the time of rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required (R. 121, n.).

made over a period of years, both before and after the chartered vessels were redelivered.

Maritime did not issue its regulations governing the charterers' final accountings for additional charter hire until most of the chartered vessels here involved were redelivered. Some of Maritime's interpretations of the statute and charter gave rise to disputes with the charterers who, nevertheless, made preliminary payments in accordance with Maritime's theories, as required by, and subject to the reservation in, Clause 13. A number of these disputes remained unresolved. At final audit respondents requested refunds of claimed overpayments of additional charter hire. These were refused and libels were then filed, in each case within two years of final audit (R. 113).

2. The proceedings below.

Petitioner filed exceptions and exceptive allegations in the district court asserting that each libel was time-barred because it was filed more than two years after redelivery of the last vessel under charter.⁴ The district

⁴ In its opening brief to the en banc court the Government changed its earlier position and, with respect to the single cause of action for the recovery of overpayments of additional charter hire, asserted that the statute of limitations began to run as follows:

⁽a) On the date of each payment.

⁽b) On the date of redelivery of the last vessel, unless the redelivery preceded publication of Maritime's accounting regulations on March 30, 1950, in which case the cause of action accrued on June 30, 1950.

⁽c) With respect to one dispute, on February 21, 1950, when Maritime published a regulation which gave rise to the dispute.

⁽d) With respect to another dispute, on the date of a charter

court denied respondents' motions to amend the libels to include further allegations on the time-bar issue, sustained the exceptions and exceptive allegations based on time-bar, held that the payments, some of which were made within two years of the filing of the libels (R. 47, 113), were "voluntary" and unrecoverable (although no such defense was raised in petitioner's pleadings (R. 17, 32, 79)), and dismissed the libels (R. 64-68, 102-103).

Respondents' appeals from the decisions of the district court were first heard by a panel consisting of Circuit Judges Hincks and Medina and retired District Judge Leibell. The case was argued January 15, 1957, and on September 25, 1957, that panel affirmed the district court dismissals, citing Sword Line, Inc. v. United States, 228 F. 2d 344 (2 Cir., 1955), affirmed 230 F. 2d 75, affirmed as to admirally jurisdiction, 351 U.S. 976, and American Eastern Corporation v. United States, 133 F. Supp. 11 (S.D.N.Y., 1955), affirmed without opinion, 231 F. 2d 664, cert. denied 351 U.S. 983, but expressing doubt as to the correctness of those decisions, stating:

nova, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. 265 F. 2d 136, at 142 (R. 112)

addendum which respondents claimed was contrary to the statute.

⁽e) With respect to other disputes, on June 30, 1951 and other dates.

In addition, the Government in a case pending in the District Court of Delaware stated that, with respect to some disputes, the claim for recovery of additional charter hire accrued on the date of final audit (Certified Record, 344a-346a).

Because of the obvious conflict in views in the circuit, respondents filed a petition for reconsideration en banc. This was granted by order dated December 19, 1957 (R. 114). The en banc court consisted of Chief Judge Clark and Circuit Judges Medina, Hincks, Waterman and Moore, all of whom were in regular active service. Judge Lumbard declined to participate because of his connection with the litigation in the district court during his tenure as United States Attorney. Judge Moore became a member of the court on September 9, 1957, 245 F. 2d VIII. Opening briefs were filed January 8, 1958, and reply briefs on January 20, 1958. The case was submitted without oral argument.

On March 1, 1958, Judge Medina retired under 28 U.S.C. 371 (R. 135), which provides that a United States judge "may retain his office but retire from regular active service after attaining the age of seventy years . ." Thereafter, on July 28, 1958, the court released its three-to-two en banc decision reversing the district court dismissals, 265 F. 2d 136 (R. 115-135). Judges Clark and Waterman dissented, believing that Sword Line, supra, in which earlier panel decision they had participated (retired Judge Learned Hand dissenting), was controlling in respect of the statute of limitations question (R. 126-135). The question of Judge Medina's eligibility to participate was raised for the first time in the dissent of Judge Clark.

The court held that "the rights of these charterers, so far as additional charter hire is concerned, are governed by Clause 13" (R. 123). As to the Government's argument that the words "final audit" in Clause 13 meant "each annual audit," the court thought that since this issue had not been raised below, it should be passed upon by the trial court after hearing whatever

evidence might be presented (R. 124). And the court said, "But we think the text of Clause 13 is an adequate, prima facie, showing of jurisdiction in the absence of pleading and proof by the Government that libelant's interpretation of Clause 13 is incorrect" (R. 124).

All claims stated in the libels were held to be covered by Clause 13 except the one for expenditures for latent defects in the Blidberg case, which was held to have arisen at some unspecified date more than two years prior to the filing of the libel and therefore to be time barred (R. 125). The court added "However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time barred" (R. 126).

The court found it unnecessary to pass upon the voluntary payment argument but said "We observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional" (R. 122, n.)

On August 26, 1958, the Government filed a petition for further rehearing en banc (R. 137). On March:

⁵ As to the "annual audit" issue, the Government's petition for further rehearing en banc (p. 7, n. 3) seemed to concede that the "annual audit" occurred concurrently with the "final audit":

The opinion omits to state that this subordinate verbal controversy has little possibility of effect on any of these eases because there is the same necessary ten-year delay in each year's final audit (whether the first or, as libelants insist, the last is referred to), and the Government has contended throughout that any possible right to bring suit accrues at once at the time of payment.

26, 1959, the petition was denied, the court dividing as it had in the opinion of July 28, 1958 (R. 137-140). In both dissents Judge Clark expressed reluctance in raising the question of Judge Medina's eligibility and "even doubt as to the ultimate wisdom" of the policy, which he thought disqualified Judge Medina from participation in the decision (R. 135, 140).

3. The petitions for writs of certiorari.

The Government petitioned for certiorari solely on the question of Judge Medina's eligibility to participate in the decision below. Respondents, including American-Foreign Steamship Corp., filed conditional cross-petitions for certiorary (Docket Nos. 332 and 334), seeking review of the statute of limitations issue if the Government's petition should be granted. The Government stated that it would not object to the granting of the cross-petitions, since an early resolution of the limitations issue appeared desirable from the standpoint of the administration of justice. The Government's petition was granted (R. 142). Respondents' cross-petitions have not yet been acted upon.

SUMMARY OF ARGUMENT

The holding below is compelled by the language of section 46(c) and by case and statute law that require a judge to complete a case lawfully undertaken. Shore v. Splain, 258 Fed. 150 (D.C. Cir., 1919); Frad v. Kelly, 302 U.S. 312, 316-317 (1937); United States exorel. Pactan v. Watkins, 164 F. 2d 457, 459-460, n. 1 (2 Cir., 1947), 28 U.S.C. 296. It is supported by the rule that a statute is not deemed to change a well-settled principle of law such as this one, absent clear evidence of an intent to do so. Miller v. Standard Nut Margarine Co., 284 U.S. 509 (1932); Ross v. Jones, 89 U.S. 576 (1875);

United States v. Thomas, 82 U.S. 337 (1873). And its soundness is underscored by a recent recommendation of the Judicial Conference of the United States.

The Government's narrow position, on the other hand, lacks statutory and decisional and indeed rational support. Frankly admitted by the dissenting judges below to be undesirable (R. 135, 180), it requires a judge to hear a case, but bars him from deciding it; it requires the reconstitution, and even successive reconstitutions, of the court whenever a member retires or a new judge is added to the circuit; it thus makes unavoidable protracted delays in decision and hampers the policy of encouraging the retirement of judges.

The Government's groping for support in the statute and legislative history is strained and unavailing. Even a literal reading of section 46(c) does not require the result urged by the Government. The legislative history shows that the statute was intended to confirm the holding in Textile Mills Sec. Corp. v. Comr. of Int. Rev., 314 U.S. 326 (1941), and the instant problem was not before either this Court or the Congress. On the other hand, the purpose of the en banc court is to resolve intra-circuit conflicts and to achieve finality of decision in the courts of appeals which generally are the courts of last resort (314 U.S. at 335). The Government's position would delay and impede rather than promote this objective.

These considerations apart, Judge Medina was, at the very least, a de facto judge and his participation in the decision below is not subject to attack here. Ball v. United States, 140 U.S. 118, 128-129 (1891); Ex parte Ward, 173 U.S. 452, 455-456 (1899).

ARGUMENT

I. Judge Medina's Participation in the Decision Below Was Expressly Required by Statute

The Judicial Code is an integrated whole, not a collection of disparate and unrelated mandates. Its separate sections must be read together to effectuate their common purpose. Section 296 categorically and without qualification expresses the deeply-rooted principle that a judge shall complete the tasks he has begun. There is nothing to suggest the existence of, nor indeed any reason to search for, a latent intent to except judges sitting en banc from this practical and sound rule.

But the Government's position is not supported even by reading section 46(c) in isolation. That section states merely that the en banc court shall consist of all active circuit judges. This necessarily and admittedly refers to the date of convening the court.

Section 296 provides:

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

The Government says that "the grant of power under 28 U.S.C. 46(c) extends to both the hearing and the determination of cases" (Br. 11). The premise that the power to hear and to decide must both be exercised is no doubt correct, but the argument that the date of decision is controlling actually rejects that premise and substitutes for it the insupportable position that the two-functions may be split and that the power to hear must be exercised even absent the power to decide.

The Government does not question that Judge Medina was required by law to perform all the duties he undertook prior to his retirement, i.e., consideration of respondents' petition for reconsideration en banc: (October 9, 1957), participation in the decision granting the petition and becoming a member of the en banc court (December 19, 1957), and receipt and consideration of briefs (January 8, 1958, January 20, 1958). On the Government's theory, Judge Medina's eligibility to participate in the decision, and presumably the propriety of the constitution of the court," must be determined as of the date of release of the decision; he was thus bound to hear and consider, but prohibited This wholly illogical result is inconfrom deciding. sistent with the purpose of the en bane procedure.

As pointed out in Textile Mills Sec. Corp. v. Comr. of Int. Rev., 314 U.S. 326, 335 (1941), a significant purpose of en banc proceedings is avoidance of intra-

The Government's equivocal position with respect to the date of determination of the propriety of the constitution of the court is discussed, infra, page 21.

circuit conflict and promotion of finality of decision in the courts of appeal which, in most cases, are the courts of last resort. But achievement of these goals is obstructed not aided by the further reconsideration, delay and possible reversal of opinion, which are made inevitable by the Government's theory.

The practical means of achieving the goals is to judge the propriety of the constitution of the court and the eligibility of the judges, both to hear and to decide, as of the date when the court is convened. Neither the later retirement of a member of the court nor the appointment to the circuit of a new judge would then delay or otherwise interfere with the orderly completion of the case. And there would thus be no departure from the principle discussed below, to which we know of no exception, that a judge must complete a case that he has lawfully undertaken even though his authority in other respects has terminated, a principle restated in the plainest terms in section 296.

⁸ The likelihood of frequent recurrence of problems arising from retirement of judges and appointment of new judges is illustrated. as follows. On May 15, 1959, less than two months after denial of the Government's petition for further rehearing en banc, Judge Hincks retired, 264 F. 2d VIII. Some four months later, on September 30, 1959, Judge Friendly took his oath of office as a judge of the Second Circuit, 268 F. 2d XII. Judge Clark reached the age of 70 on December 9, 1959, 28 Who's Who in America, 1954-1955, p. 485. He has not retired, although he has relinquished his duties as Chief Judge, presumably under 28 U.S.C. 45. There are now five judges on the Second Circuit who have not retired: Chief Judge Lumbard, Circuit Judges Clark, Waterman, Moore ad Friendly. Since the statutory complement for the Second Circuit is six judges, 28 U.S.C. 44(a), there is still a vacancy. Distriet Judge J. Joseph Smith was nominated on August 27, 1959 to fill this vacancy (New York Times, August 28, 1959) but he has not yet been confirmed. And there is legislation pending to adds two additional judges to the Second Circuit. H.R. 6159, 86th 5 Cong., 1st Sess.

The Government's counter-argument that the purposes of section 46(c) are to be achieved only by judges who, at the date of decision, have not yet retired rests upon a pseudo-literal reading of the statute. Actually, however, even a literal reading does not support it and, in any event, the Government's ritualistic approach ignores the rationale of *Textile Mills* (at page 324) that common sense must prevail over literalism.

The reasoning of Judge Schnackenberg in his dissent in G. H. Miller & Company v. United States, 260 F. 2d 286, 292 (7 Cir., 1958), cert. denied 359 U.S. 907, is most persuasive, particularly as applied to the narrower issue in the instant case.

We are not justified in attributing to congress an intention, by § 46, to prevent a judge, who actively sits on the panel which decides an appeal, from participating in an en banc hearing on a petition for rehearing, the object of which is to overturn a major part of the panel's decision. A reading of both §§ 294 and 296, in conjunction with § 46. dispels any such legislative intention. only reasonable construction which can be given to the entire pertinent legislative language, in its application to this case, is that the designation and assignment of Judge Major to this case bestowed upon him the duty of acting as a judge therein and in the consideration and disposition of such applications for rehearing as have been or will be filed therein. It would be incredible that congress intended that an experienced and capable retired judge, who voluntarily accepts an assignment to hear a case in his own circuit and in the decision of which he has joined, should be excluded from the consideration of a petition for rehearing thereof, whether or not it is to be heard by the original panel of which he is a member or the court sitting en banc. Such a result would be incongruous and contrary to common sense. * * *

We believe with Judge Schnackenberg that the complete answer to the Government's argument is that Judge Medina did not, by reason of his retirement, cease to be an active judge in this case in which he was already engaged.9 In Herzog v. United States, 235 F. 2d 664, 670, n. (9 Cir., 1956), cert. denied 352 U.S. 884: Commercial Nat. Bank in Shreveport v. Connolly, 177 F. 2d 514 (5 Cir., 1949); and United States v. Sentinel Fire Ins. Co., 178 F. 2d 217, 239 (5 Cir., 1949). circuit judges participated in the en banc decisions although they had retired after commencement of the proceedings. See also Bishop v. Bishop, 257 F. 2d 495, 501-502 (3 Cir., 1958), cert, devied 359 U.S. 914, in which Judge Magruder of the First Circuit sat by designation as a member of a three-judge panel in the Third Circuit and then participated in the decision denving rehearing en banc. In In re Sawyer, 260 F. 2d 189, 203, n. 17 (9 Cir., 1958), reversed on other grounds 360 U.S. 622, Chief Judge Denman participated in a proceeding en banc and, having retired before announcement of the decision, did not participate in the decision because he, not the court, thought it inappropriate to do so.

⁹ It is unnecessary for this Court to decide whether a judge who retired before decision by a panel of which he was a member, is eligible to participate in en banc reconsideration of that appeal. The cases in which the retired judge did not participate are rearranged by California Tanker Company, 260 F. 2d 369 (2 Cir., 1958), cert. denied 359 U.S. 926; Harmar Drive In Theater, Inc. v. Warner Bros., 241 F. 2d 937 (2 Cir., 1957), cert. denied 355 U.S. 824; United States v. Gordon, 253 F. 2d 177, 191-192 (7 Cir., 1958), reversed on other grounds 344 U.S. 414; G. H. Miller & Co. v. United States, 260 F. 2d 286, 305-307 (7 Cir., 1958), cert. denied 359 U.S. 907.

But see the recommendation of the Judicial Conference of the United States, discussed, infra, at page 19.

II. The Propriety of Judge Medina's Participation in the Decision Below Is Fully Supported by Established Principles of Law

The legislative history relied upon by the Government is inconclusive and unpersuasive. The reviser's note shows that the en banc provision of section 46(a) was enacted to give statutory expression to this Court's holding in Textile Mills Sec. Corp. v. Comr. of Int. Rev., 314 U.S. 326 (1941), that a court of appeals might lawfully consist of more than three judges sitting en banc and the questions now before the Court were not presented in that case. Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247 (1953).

Nevertheless, there are other means of ascertaining the legislative intent, one of which seems well night conclusive here. The principle is long-settled that a properly qualified judge who hears a case has not only the right but the duty to complete it, notwithstanding that some intervening event may have disqualified him from hearing any new cases. It is also a well-settled principle of statutory construction that, unless there is clear evidence of intent to do so, a statute will not be construed to change established principles of law.

This Court stated the latter rule in *Thompson* v. *United States*, 246 U.S. 547, 551 (1918):

... we cannot doubt that if the Congress had intended... to change the law as evidenced by the Whitfield decision, of which we must assume that it had full knowledge (Chesapeake & P. Teleph. Co. v. Manning, 186 U.S. 238, 245, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881), it would have done so in plain terms, especially in a matter of such great importance as we have here . . .

This principle has been frequently reiterated. United States v. Thomas, 82 U.S. 337 (1873); Ross v. Jones, 89 U.S. 576 (1875); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed. 316, 321 (6 Cir., 1908); Globe & Rutgers Fire Ins. Co. v. Draper, 66 F.2d 985, 991 (9 Cir., 1933); Thummess v. Von Hoffman, 109 F.2d 291, 292 (3 Cir., 1940); Schwartz v. Inspiration Gold Mining Co., 15 F. Supp. 1030, 1034 (Mont., 1936); In Re Big Blue Min. Co., 16 F. Supp. 50-52 (N.D. Cal., 1936).

That a judge must complete his unfinished cases, notwithstanding the termination of his authority to begin new ones, has also been frequently and authoritatively stated. In Shore v. Splain, 258 Fed. 150 (D.C. Cir., ·1919), a municipal court judge had presided at a police court trial under a designation which authorized him "to discharge the duties of either of the judges of the police court during their sickness, vacation, or disability" The convicted defendant was sentenced by the municipal court judge on September 7, 1918, on which date the two regular police judges were in court discharging their duties. The defendant brought a writ of habeas corpus which was dismissed by the Supreme Court of the District of Columbia. Court of Appeals, rejecting an argument similar to that urged by the Government at bar, held (page 152):

According to the appellant the moment the disability of the regular judge is removed, the power of the designated or special judge ceases, even though he may be in the midst of an important trial thus rendering nugatory all that had been done in the trial up to that time. Such a construction would lead to great public inconvenience and

should not be adopted if it can be avoided. Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Bird v. United States, 187 U. S. 118, 124, 23 Sup. Ct. 42, 47 L. Ed. 100.

It was undoubtedly the intention of Congress in providing for a temporary judge, that he should perform the duties of the position during his incumbency and complete any work entered upon by him before he withdrew from the place; otherwise, as in the case of a trial, much of his effort might come to naught if the return to duty of the regular judge had the effect of terminating his authority, and thus the purpose of Congress in providing for a substitute judge would be defeated in many cases. The fact that this interpretation may authorize the presence temporarily of three de jure judges of the court does not militate against it, for Congress has the power to provide for as many judges of the court as it may think proper.

State v. Stevenson, 64 W. Va. 392, 62 S.E. 688 (1908); upheld the corollary position that a regular judge was without power to sentence a prisoner who had pleaded guilty to a special judge serving in his absence. Reversing the judgment of conviction, the court held that, although the appearance of the regular judge "operated to vacate the office of the special judge", nevertheless the rule is "that the return of the regular judge did not oust the special judge of jurisdiction to try and finally dispose of any case begun before him".

And it was said in *State* v. *Butner*, 67 Nev. 436, 220 P.2d 631, 632 (1950), n. 2:

... The general rule appears to be that the special or pro tempore judge retains jurisdiction until the final determination of the ease. See Annotation

134 A.L.R. 1130; Fisher v. Puget Sound Etc. Co., 34 Wash. 578, 76 P. 107. The texts appear unanimously to support this view.

In State v. Bobbitt, 215 Mo. 10, 114 S.W. 511 (1908), the rule was applied where a judge of one county circuit court tried a case in another circuit court because of the illness of the regular judge. He had been authorized to act as substitute for a period which ended with the August term of the latter court. Rejecting the contention that the signing of a bill of exceptions on April 1 of the following year was without authority and void, the court held that no judge other than the visiting judge who had tried the case had authority to allow and sign the bill of exceptions.

Many other decisions support the foregoing rule. Frad v. Kelly, 302 U.S. 312, 316-317 (1937); United States ex rel. Paetau v. Watkins, 164 F.2d 457, 459-460, n. 1 (2 Cir., 1947); United States v. Marachowsky, 213 F.2d 235, 244 (7 Cir., 1954); United States v. Garsson, 291 Fed. 646, 647, 648 (S.D.N.Y., 1923); Hicks .v. United States Shipping Board Emergency Fleet Corp., 14 F.2d 316, 317 (S.D.N.Y., 1926); Sunrise Mayonnaise v. Swift & Co., 88 F. Supp. 187, 189 (E.D. Pa., 1949); Cheesman v. Hart, 42 Fed. 98, 105-106 (Cir. Ct. Colo., 1890), cert. denied 163 U.S. 704; State v. Fidelity & Deposit Co., 136 Mo. App. 330, 117 S.W. 618 (1909); Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash, 578, 76 Pac. 107' (1904); Brunswick Village x. Knof, 29 N.J. Super. 238, 102 A.2d 383 (1954). And the principle for which all of these cases stand has long been aspart of our statute law. 28 U.S.C. 296.

That principle was given renewed endorsement by the Judicial Conference of the United States, ¹⁰ which, at its meeting of September 16-17, 1959, approved a report by Judge Maris on behalf of the Committees on Court Administration and Revision of the Laws, stating:

... the Committees thought it proper to permit a retired circuit judge to be a member of the court of appeals sitting in banc in the rehearing of a case in which he has sat, by assignment, in the panel of the court which heard the case originally.

The Conference also approved the draft of a bill presented by the Committees, clarifying the status of retired judges in accordance with the views of the Conference. House Doc. No. 321, 86th Cong., 2d Sess., pages 7, 9-11. A fortiori, the view of the Conference would clearly be that Judge Medina, who was active when the en banc court was convened, was eligible to participate in the decision.

There is nothing in section 46(c) or indeed in any other provision of the Judicial Code that even remotely suggests an intention to abrogate or modify the rule that a judge must complete a case lawfully undertaken. The contrary intent is evidenced by the fact at that the Congress failed to except judges sitting on bance from the provisions of section 296. And the applicable statutes have been and still are completely consistent with the intention to adhere to this sound rule.

one. House Doc. No. 321, 86th Cong., 2d Sess., page 6.

III. Practical Considerations Also Support Judge Medina's Eligibility

This Court said in Textile Mills Sec. Corp. v. Comr. of Int. Rev., 314 U.S. 326, 335 (1941):

Such [practical] considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited, from sitting en banc. But where, as here, the case on the statute is not forcelosed, they aid in tipping the scales in favor of the more practicable interpretation.

So, here, at the very least, respondents' "case on the statute is not foreclosed". And practical considerations may appropriately be weighed. These considerations are that the Government's position makes inevitable and respondents' position avoids, inordinate delays in reaching final decisions and impediments to retirement.

The Government indicates that, if the decision below should be reversed and the case remanded, a disposition could be made of the instant case without further delay. On the contrary, in that event, we think that the appeal would have to be reconsidered by an enbanc court participated in by Judge Friendly and all other judges who are still "active" at the date of decision.

But even if additional delay could be avoided here, that still would not be dispositive. The Government's petition for certiorari was grounded exclusively upon the contention that "this case raises a question of general importance in the administration of justice by the courts of appeals" (page 7), and its brief on the merits notes the absence of "decisions treating the precisely identical en banc issue posed in this case" (page 23,

n. 23). A decision that will resolve questions of general importance must therefore rest upon a consideration of all possible factual situations even if they are not actually present here. It is necessary, therefore, to consider the situation in which, before decision by an en banc court, a member retires and a new judge is appointed to the circuit.

The Government equivocally offers two possible solutions: that the court "might proceed to decision on the merit[s] without the participation of either the retired judge or his successor, or it might permit the new active judge to participate (possibly without reargument, at least in a case such as this, which has been submitted on briefs to the court en banc)" (Br. 14).

The first alternative results in an irreconcilable conflict. Section 46(c) provides in relevant part that "A court in bane shall consist of all active circuit judges of the circuit". Whatever the resolution of the issue as to the date on which this condition must be met, we think it hopelessly compounds confusion to assert that one date should be determinative with respect to the retired fidge and another as to the new judge. Yet, the Government states categorically that Judge Medina's eligibility must be determined as of the date of decision; on the other hand, it concedes that, as to new judges, compliance with the requirement that the court consist of all active judges may be determined as of some earlier date.

The Government cannot escape the conclusion of consistency, that if the retired judge is ineligible it is because the decision date is determinative and therefore the new judge must be included in the court; and

that if the new judge need not be included it is because the date of convening is determinative, in which case the retired judge remains eligible.

This leaves only the Government's alternative suggestion that the new judge participate, possibly without hearing argument. It is unnecessary to labor the point that, with or without argument, the exclusion of an experienced judge familiar with the case and the addition of a new judge to the en banc court would necessarily mean further delay. The new judge would have to familiarize himself with the record and the briefs and might very well want the benefit of a discussion of the case in conference. He might also present a point of view not theretofore considered. And, the delay, thus made unavoidable, would be further prolonged if, meanwhile, another judge were appointed to the circuit or another judge retired.

The construction urged by the Government also would almost inevitably impede the congressional policy to encourage the retirement of judges under 28 U.S.C. 371. This policy enables the courts better to

¹¹ The instant case was argued before a three-judge panel on January 15, 1957. The Government's petition for further rehearing en banc was denied March 26, 1959, more than two years later. Since the latter date Judge Hincks has retired, Judge Friendly has been added to the circuit and there is an unfilled vacancy.

^{12 28} U.S.C. 371 provides:

^{§ 371.} Resignation or retirement for age

⁽a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of sevent years and after serving at least ten years continuously or therwise shall during the remainder of his lifetime, continue to receive the salary which he was receiving when he resigned.

⁽b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire

cope with their heavy responsibilities. It remins the services and wisdom of the retired judges and at the same time adds new judges to the bench.

However, it seems likely that judges who are planning to retire would be reluctant to do so if, as a result, they would have to withdraw from cases in which they are sitting, particularly if, as is so often the case in en banc proceedings, the issues are important and the court is divided. And the problem would be magnified if the withdrawal of a judge might change the result.

Judge Medina believed that his retirement did not make him ineligible to join in the decision. Had he been of the contrary opinion, it is doubtful that he would have retired because the result would have been to restore the earlier 2-2 deadlock (Judges Hincks and Medina against Judges Clark and Waterman). Judge Medina would then have had to defer his retirement for a year, until after denial on March 26, 1959, of the Government's petition for further rehearing en banc.

from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

18 It was no doubt this deadlock that accounted for the three-judge court's reluctant, acquiescence on September 25, 1957, in Nword Line and American Eastern, supra, which were later over-ruled. And it was probably the accession of Judge Moore on September 9, 1957, 245 F. 2d VIII, that accounted for the granting of respondents' petition for reconsideration en banc.

In the instant case the *en banc* proceedings added more than 15 months to the time theretofore consumed in the determination of the appeal. The extent of the possible delay in other cases is indicated by the report of the Director of the Administrative Office of the United States Courts for the fiscal year ended June 30, 1959, which stated:

"For cases terminated after hearing or submission in all courts of appeals in 1959, the median [time interval from the filing of the complete record to final disposition] was 6.7 months". (House Doc. No. 321, 86th Cong., 2d Sess., page 4)

Section 46(c) does not authorize an eligible judge to decline to participate in an en banc proceeding because he intends soon to retire. And if, prior to decision in a pending en banc case, another case is ordered to be considered en banc, his retirement might (if the Government's interpretation of the statute were accepted) be further deferred. Indeed, on the basis of the median time for all appeals, it would take but two en banc cases per year, appropriately spaced, to defer his retirement indefinitely.¹⁴

¹⁴ In the fiscal year ending June 30, 1959, 22 cases were ordered heard en banc as follows:

Circuit	En Banc Hearings
Circuit D.C.	5
-3rd	4
8th	2
9th	8/
10th	3/
	+
Total	22

One en banc proceeding was begun over a year ago and is still undecided, one lasted a year, and ten lasted three months or longer. The cases are listed in Appendix A.

There should be compelling support, which is wholly absent here, for a construction of the statute which makes inevitable such undesirable results.

IV. Judge Medina Was at Least a Judge De Facto and the Propriety of His Participation in the Decision Below Is Not Open to Attack Here

Judge Medina, as the Government admits, had lawfully participated in the hearing of the case en banc, as required by statute. Even if it were correct to say that his retirement terminated his status as an active judge with respect to the final decision, he remained at least a de facto judge and the en banc decision should be sustained on this further ground. Ball v. United States, 140 U.S. 118, 128-129 (1891); Ex Parte Ward, 173 U.S. 452, 455-456 (1899); Two Guys from Harrison-Allentown, Inc. v. McGinley, 266 F.2d 427, 430-431, n. 1 (3 Cir., 1959); Shore v. Splain, 258 Fed. 150, 151-154 (D.C. Cir., 1919).

The Government argues that the de facto doctrine "does not reach the situation, such as the instant case, where a judge is expressly precluded from a special type of judicial action by legislative mandate" (Br. 28). Even if the Government were correct as to the interpretation of the statute, nevertheless its conclusion is contrary to the authorities. In Ball v. United States, supra, a statute permitted a judge, during the disability of another judge, to be designated to sit in the latter's district. The disabled judge died but this Court held that the substitute was authorized to continue to sit thereafter. The Court held that the substitute was "judge de facto, if not de jure".

The report of the case at page 128 appears to contain a typographical error. It states that Judge Sabin died March 30, 1889. From the context it would seem that he actually died March 30, 1890.

Similarly, in Shore v. Splain, supra, the relevant statute provided that a municipal court judge could be designated to serve in the place of one of the two police court judges "In case of sickness, absence, disability, expiration of term of service . . . or death". The question was whether, under this statute, the substitute municipal court judge, when both police court judges were on the bench, could sentence the defendant whom he had tried in the absence of one of them. It was held that he was a de jure judge when he sentenced the defendant "but, if not, he was at least a de facto one"."

The cases relied upon by the Government (Br. 26-27), are not in point. Moreover, in none of them was the de facto question discussed or seemingly raised or considered.

Thus, for example, in Frad v. Kelly, 302 U.S. 312 (1937), it was held that a judge who sat by designation in a district other than his own, and tried and sentenced the defendant, had no authority, after his designation had expired and he had returned to his own district, to entertain a petition for discharge from probation. The decision turned on the holding that such a petition was a new matter, as to which, being without the color of initial authority, he was in the position of a usurper.

In Case v. Hoffman, 100 Wis. 314, a judge, who had tried a case in a lower court, participated in its hearing on appeal in violation of statute. He had no right to hear the appeal ab initio. The fact that he had tried the case, far from giving him any color of right to continue with it on appeal, disqualified him from doing so. Here, too, the judge's position was that of a usurper.

In Watson v. Payne, 94 Vt. 299, the relevant statute provided that a justice of the peace could not try a

case appealable to a county court. A justice of the peace tried such a case and here, too, he was held to be a usurper because of his lack of authority *ab initio* to hear the case.

And in In re Woodside-Florence Irrigation District, 121 Mont. 346, a statute required a judge to withdraw from a case upon the filing of an affidavit of prejudice. Such an affidavit was filed, but the trial judge declined to withdraw. It was held that he was a userper,

CONCLUSION

For the foregoing reasons, the judgment below was proper and should be affirmed. However, the Court may dispose of the case in such manner "as justice may at this time require". Langues v. Green, 282 U.S. 531 (1931); United States v. Carnigan, 342 U.S. 36, 38 (1951); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 330 (1936). If it should be held that the decision below is affected by some infirmity in the en banc proceedings, it still may properly be affirmed on the ground that the case was correctly decided on the merits. In the alternative, respondents' cross-petition for certiorari should be granted.

Respectfully submitted,

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Kominers & Fort, John Cunningham, Israel Convisser,

Of Counsel.

April 13, 1960

APPENDIX A

Cases in Which En Banc Proceedings Were Commenced in the Year Ending June 30, 1959

Date Case Argued

Title	or Commenced En Bane	Date . Decided .
D	C. Circuit	
King v. United States, 263 F. 2d 567	Oet. 6, 1958	Jan. 18, 1959
Brown v. United States, 264 F. 2d 363	Oct. 6, 1958	Feb. 5, 1959
Smith v. United States, 270 F. 2d 921	Jan. 19, 1959	July 7, 1959
Brandon v. United States, 270 F. 2d 311	May 5, 1959	July 9, 1959
Blocker v. United States, 274 F. 2d 572	Apr., 6, 1959	June, 25, 1959
	3rd Circuit	
Green v. Murphy, 259 F. 2d 591	July 7, 1958	Sept. 25, 1958
Corabi v. Auto Racing, Inc. 264 F. 2d 784	Dec. 1, 1958	Feb. 26, 1959
Jamison v. Kammerer, 264 F., 2d 789	Dec. 1, 1958	Feb. 26, 1959
King v. Waterman, 272 F. 2d 823	Dec. 1, 1958	Nov. 17, 1959
	8th Circuit	
·Aaron v. Cooper, 257 F. 2d 33	Aug. 4, 1958	Aug. 18, 1958
Clinton Foods, Inc. v. Your 266 F. 2d 416	ngs, Apr. 17, 1955	May 11, 1959

	Title		Case Argued Commenced En Banc	Date Decided	1
		9th Circ	ult		
	United States v. Price, 263 F. 2d 382	Oet.	13, 1958	Jan. 2, 1959	
	Leary v. United States, 268 F. 2d 623	Feb.	19, 1959	May 18, 1959.	
	Fisher Flouring Mills. v. United States, 270 F. 2d 27	Mar.	30, 1959	June 30, 1959	
	Pacific Gamble Robinson (United States, 270 F. 2d 35		30, 1959	June 30, 1959	
	Albers Milling Co. v. United States, 270 F. 2d 36	- Mar.	30, 1959	June 30, 1959	
1	Schlothan v. Terr. Alaska, F. 2d — (Doc. 15817)	 Mar.	30, 1959	Feb. 9, 1960*	
	Yanow v. Weyerhaeuser St 274 F. 2d 294		29, 1959	Nov. 12, 1959	
	Ginoza v. United States, F. 2d — (Doc. 15278)	Oet.	13, 1958	Not yet decided	/
		10th Circ	uit		

10th Circuit

Pryor v. Moore, 262 F. 2d 673	Dec. 22, 1958	Jan. 21, 1959
Stewart v. United States, 267 F/2d 378	Mar. 25, 1959	May 6, 1959
Petersen United States, 268 F. 2d 87	Mar. 25, 1959	June 8, 1959

^{*} Information obtained from Administrative Office of the United States Courts.

Office-Supreme Court, U.S. FILED APR 20 1960 MMES R. BROWNING, Clerk

No. 188

of Property Court of the United States

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UNITED STATES OF AMERICA, PRINTIPIONER

DAN-PORMON STRAMBHIP CORP., BY AL.

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Afternoys, rimens of Institute, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, PETITIONER

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

T

The problem of participation by circuit judges in actions taken by a court of appeals after their retirement can arise in various factual situations which bring into play different statutory provisions. Respondents have indiscriminately lumped these various situations together, and have thus obscured the consideration which is decisive here; that the action in which the retired judge participated was by the court of appeals en banc, not a three-judge division or panel, and that the action was not the grant or denial of a petition for rehearing en banc but a decision on the merits by the court en banc.

1. Participation by a retired circuit judge in decision by a three-judge panel, of which he was a member, of a case heard before his retirement. This is the situation presented by Goldfine v. United States, 268 F. 2d 941 (C.A. 1), pending on petition for ecertiorari, No. 396, this Term, and the other recent cases in the First and Second Circuits (involving Judges Magruder and Medina) cited in the brief for respondent American-Foreign Steamship Corp., pp. 51-54.

Here, of course, the last sentence of 28 U.S.CF 46(c), providing that "A court in bane shall consist of all active circuit, judges of the circuit," is in terms wholly inapplicable. The relevant statutory provisions are, rather, 28 U.S.C. 43, 294, and 296 (quoted in the Appendix to the Government's main brief, pp. 30-33). Under these provisions there is no question of the power and right of a retired circuit judge to participate in the decision of a case heard before his retirement by a three-judge panel of which he was a member. The only possible problem is whether a formal written designation and assignment by the chief judge is required. In cases heard before retirement, the validity of the circuit judge's designation inheres in the fact that he was properly assigned to the case as an active judge and that his continued participation is with the knowledge and at least tacit acquiescence of the chief judge. In such circumstances, it would be insisting upon an idle and unnecessary formality for the chief judge to be required to state in writing what is patently the fact, namely, that the retired judge/has

been authorized to see the case through to its conclusion notwithstanding his retirement. (See the cases in ten circuits cited in the brief for respondent American-Foreign Steamship Corp., p. 50.)

The controlling consideration, we repeat, is that Section 46(c), dealing with en banc proceedings, imposes no barrier whatsoever to a retired judge's participation in decisions by a three-judge panel.

2. Participation by a retired, or assigned, judge in determining whether or not a petition for rehearing en banc should be granted. The problem in this situation is suggested by Commercial Nat. Bank in Shreveport v. Connolly, 177 F. 2d 514 (C.A. 5); United States v. Sentinel Fire Ins. Co., 178 F. 2d 217 (C.A. 5); G. H. Miller & Co. v. United States, 260 F. 2d 286 (C.A. 7); United States v. Gordon, 253 F. 2d 177 (C.A. 7); and cf. Bishop v. Bishop, 257 F. 2d 495 (C.A. 3). (The facts of these cases are described in our main brief, p. 19, note 17, and p. 23, note 23.)

Here, again, the last sentence of 28 U.S.C. 46(c), quoted supra, p. 2,—which we think governs the different situation presented by the instant case—is in terms wholly inapplicable. The controlling provision is, rather, the first sentence of Section 46(c), providing that "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service."

This Court has held that the statute does not compel the courts of appeals to adopt any particular procedure governing the exercise of the power to hear or rehear cases en banc, and that it may entrust the

initiation of rehearings en banc to the three-judge division which originally heard and decided the case. Western Pacific Railroad Case, 345 U.S. 247, 267-268. Accordingly, there would appear to be no reason why a retired or assigned judge who has sat in the case may not take part in the consideration of a petition for rehearing en banc if the court of appeals chooses to allow such a procedure. But it does not follow that a retired or assigned judge may effectively vote to grant a rehearing en banc. Under Section 45(c), a. rehearing en banc may be ordered only "by a majority of the circuit judges of the circuit who are in active service." We are aware of no case in which rehearing en banc was granted on the basis of a vote by any judge who was not a circuit judge of the circuit in active service. In the instant case, for example, the order of December 19, 1957 (R. 114), granting rehearing en banc recited that "The division of the court which heard and decided these appeals having referred the pending petitions for rehearing to the whole court 1 and the court having voted to grant the petitions for en banc procedure, * * *." Presumably, neither , Judge Leibell, the retired district judge who sat by designation as a member of the three-judge division, nor retired circuit Judges Hand, Swan and Chase joined in this order.

The reference to "the whole court" is clearly to the circuit judges of the circuit in active service. See Reardon v. California Tanker Co., 260 F. 2d 369, 375 (C.A. 2); United States v. Silverman, 248 F. 2d 671, 696 (C.A. 2). Accord: United States v. United Steelworkers of America, 271 F. 2d 676, 694 (C.A. 3) (retired Judge Maris did not vote on whether rehearing en banc should be ordered; the judges in active service, being equally divided, there was no rehearing). See also the Fifth and Seventh Circuit cases cited supra. p. 3.

3. Participation by a retired judge in the decision by the court en banc of a case heard prior to his retirement. This problem is presented by the instant case. While the situation has doubtless arisen elsewhere, it appears to have been expressly noticed in only two other cases, both in the Ninth Circuit (In re Sawyer, 260 F. 2d 189, 203, note 17, reversed, on other grounds, 360 U.S. 622; Herzog v. United States, 235 F. 2d 664, 670, note (discussed in our main brief, p. 23, note 23)), where conflicting results were reached.

oIn this situation, 28 U.S.C. 46(c) would appear to be unequivocal and decisive. Our argument is elaborated in the main brief and will not be repeated here.

4. Participation by a retired circuit judge in an enbanc proceeding where his retirement preceded the hearing as well as the decision.

In this situation it is entirely clear that 28 U.S.C. 46(c) precludes participation by a retired judge, even if he sat, as an active judge or by assignment, on the panel which heard the case originally. For example, in Reardon v. California Tanker Co., 260 F. 2d 369, 375, 376 (C.A. 2), Judge Medina, who had taken part in the original three-judge panel decision, retired before the rehearing en banc was ordered. He withdrew from the en banc proceeding. This has been the uniform practice in the Second Circuit (see cases cited in the separate statement of Chief Judge Clark

² Semble: Corabi v. Auto Racing, Inc., 264 F. 2d 784 (C.A. 3); Jamison v. Kammerer, 264 F. 2d 789 (C.A. 3); United States v. Price, 263 F. 2d 382 (C.A. 9).

and Judge Waterman, R. 140) and other circuits. Since the inability to sit on the en banc court arises out of the status of being a retired, rather than active, judge, it cannot be cured by a designation and assignment.

However, if respondents are correct in their contention that the literal terms of Section 46(c) must yield to the principle that "a properly qualified judge who hears a case has not only the right but the duty to complete it" (Br. 15), it would follow that any judge who properly sits with a three-judge division should also be a member of the en banc court. This would be true regardless whether he retires before or after rehearing en banc is ordered; regardless whether he is a circuit judge of the circuit or a circuit justice, circuit judge of another circuit, district judge, or other federal judge (e.g., of the Customs Court) sitting by designation; and regardless whether he was active or retired when he took part in the threejudge division hearing. On this theory, Judge Leibell (the retired district judge sitting by designation) should not have withdrawn from the instant en banc proceedings. Presumably, if the division had consisted (as it properly could have) of Judge Leibell, a retired circuit judge, and a judge assigned from

^{*}G. H. Miller & Co. v. United States, 260 F. 2d 286, 291—293 (C.A. 7); United States v. Gordon, 253 F. 2d 177, 191—192 (C.A. 7); Aaron v. Cooper, 257 F. 2d 33 (C.A. 8); Leary v. United States, 268 F. 2d 628 (C.A. 9); Fisher Flouring Mills Co. v. United States, 270 F. 2d 27 (C.A. 9); Pacific Gamble Robinson Co. v. United States, 270 F. 2d 35 (C.A. 9); Albers Milling Co. v. United States, 270 F. 2d 36 (C.A. 9); Pryor v. Moore, 262 F. 2d 673 (C.A. 10); Stewart v. United States, 267 F. 2d 378 (C.A. 10); Petersen v. United States, 268 F. 2d 87 (C.A. 10).

another circuit or district, all three of them would (on respondents' theory) not only be entitled, but actually required, to sit as members of the court of appeals en banc. This would reduce the purpose of en banc proceedings to an absurdity, and would be clearly contrafy to Section 46(c), which says that "A court in banc shall consist of all active circuit judges of the circuit" without adding, as Section 43(b) does, a further sentence that "The circuit justice and justices or judges designed or assigned shall also be competent to sit as judges of the court [in banc]."

TT

Unless the express language of Section 46(c) is to be ignored, the en banc court here was improperly constituted because of Judge Medina's participation in the decision, his vote being decisive, and hence the judgment below was invalid and should be vacated. Respondents argue, however, that the statute should not be read to mean what it says because to do so would attribute to Congress a "capricious" and "illogical" intent to interfere with the orderly administration of the courts. While we doubt the relevance of this line of argument here, several brief comments may be made.

^{&#}x27;In Herzog v. United States, 235 F. 2d 664, 670, n. (C.A. 9), the three-judge division which originally heard the case consisted of Judge Chambers (an active circuit judge), Judge Mathews (a retired circuit judge sitting by designation), and Judge Byrne (an active district judge sitting by designation). When the case was ordered to be heard en banc, Judges Mathews and Byrne withdrew.

As appears infra, p. 9, the amendment of Section 46(c) proposed by the Judicial Conference would allow only retired circuit judges of the circuit, who have sat in the original hearing, to participate in an en banc rehearing.

- 1. To the extent that Section 46(c), in its present form, may be deemed to present obstacles to the expeditious dispatch of judicial business, the way to deal with it is through new legislation. Thus, at its regular annual meeting in September 1959, the Judicial Conference of the United States took note of this and related problems. Its Report (H. Doc. No. 321, 86th Cong., 2d Sess., pp. 9-10) stated:
 - (5) The status of retired circuit and district iviges.—The Committees fon Court Administration and Revision of the Laws | reported that various questions had arisen as to the status of retired circuit and district judges with respect to their participation in certain activities of their former courts when they are assigned to active duty therein. These include the participation of retired circuit and district judges in the appointment of officers of the court and in the promulgation of court rules, and, in the case of retired circuit judges, membership on the judicial council of the circuit and of the court of appeals sitting in banc. It was the view of the Committees that under the statute only judges who are in "regular active service", that is, those who have not retired under Section 371(b) or 372(a), Title 28. United States Code, are the judges in "active service" to which the statutes refer. However, the Committees thought it proper to permit a retired circuit judge to be a member of the court of appeals sitting in banc in the rehearing of a case in which he has sat, by assignment, in the panel of the court which heard the case originally. The Conference agreed and thereupon approved the following draft of a bill, presented by the Committees, clarifying the

statute and incorporating the change suggested, [Emphasis added.]

The draft bill approved by the Judicial Conference (subsequently introduced by Representative Celler on April 5, 1960, as H.R. 11567, 86th Cong., 2d Sess.) would amend Section 46(c) by adding the following sentence:

A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

2. Respondents assert that Section 46(c), if read literally, would create delays and have other undesirable results in the disposition of cases heard en banc because (1) a judge familiar with the case would have to withdraw upon his retirement; and (2) the en banc court would have to be reconstituted whenever a new circuit judge, not familiar with the case, is appointed.

We suggest that these difficulties have been overdrawn. As to the first, the retired judge might be able to accommodate himself to the needs of the situation by making his retirement effective on such date as he has completed all his unfinished judicial duties.

[&]quot;In this case rehearing en bane was granted, in an order signed by Judge Medina, on December 19, 1957 (R. 114). Argument was confined to the briefs, which were filed January 8 and 20, 1958.

On January 28, 1958, Judge Medina (who became eligible for retirement on his 70th birthday, February 16, 1958) publicly stated he was considering retirement "in a few months." (N.Y. Times, Jan. 29, 1958, p. 17, col. 8.) In a statement from the bench on February 7, 1968, he announced his retirement

Hearings en banc are the exception, not the rule; and ordinarily there is no serious problem since (as noted supra, pp. 2-3) in cases decided by a three-judge panel, retirement does not prevent a judge who has sat in the case from participating in the decision (see, esp., 28 U.S.C. 296, quoted in our main brief, p. 32).

Nor, as to newly appointed judges, is there any serious problem of "reconstituting" the court. The new circuit judges are, of course, members of the court of appeals en banc just as newly appointed Justices are members of this Court. But newly appointed Justices customarily refrain from participating in the decision of cases heard by the Court before their appointment and with which they are not familiar. The same rule of judicial practice would allow a new circuit judge not to participate in the decision of cases heard and taken under advisement by the court en banc prior to his appointment. Or

from active service, effective March 1, 1958. (N.Y. Times, Feb. 8, 1958, p. 5, col. 5.)

The decision en bane was announced on July 28, 1958 (R. J.18).

⁷Cf. the divergent points of view expressed by Judges Danaher and Fahy in Cafeteria and Restaurant Workers Union v. McElroy (C.A. D.C.), decided April 14, 1960.

As examples: In Yanow v. Weyerhaeuser Steamship Co., 274 F. 2d 274 (C.A. 9), which was argued en hanc on June 29, 1959; Judge Koelsch was appointed and took the oath on September 25, 1959, and Judge Merrill on October 8, 1959; the case was decided by the en banc court on November 12, 1959, Judges Koelsch and Merrill not participating. In In re Sawyer, 260 F. 2d 189, 203, n. 17 (C.A. 9), Judge Denman retired after hearing argument as a member of the en banc court and his successor, Judge Hamlin, took the oath on April 16, 1958, before the en banc decision was announced on June 9, 1958; neither Judge Denman nor Judge Hamlin participated in the en banc decision.

the court of appeals, as this Court has sometimes done, could decide that the case should be reheard before the entire court, including the new member. At all events, the matter would rest within the control and responsible discretion of the court of appeals and its judges. 10

Respectfully submitted:

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Assistant Attorney General.
Philap Elman.

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ALAN S. ROSENTHAL, HERBERT E. MORRIS,

Attorneys.

APRIL 1960.

briefs present their version of the facts underlying that issue as if the "facts" set forth were undisputed or had been decided in their favor by the en bane majority below. Such is not the case, however. The court below merely acknowledged respondents' version of facts (which the Government regards as inaccurate) as "claims" and remanded for the very purpose of ascertainment of the facts and determination of limitations in the light of any evidence the parties might introduce. (R. 120–122, 123–125, 126.)

⁹ For example, King v. Waterman Steamship Corp., 272 F. 2d 323 (C.A. 3), was first reargued en bane on December 1, 1958. Judge Maris, who sat as a member of the en bane court, retired on December 31, 1958, and was replaced by Judge Forman, who took the oath on September 21, 1959. The case was set down for second reargument en bane on October 5, 1959, with Judge Forman sitting and Judge Maris withdrawing from further participation in the case. On November 17, 1959, the case was decided by a 4 to 3 vote, Judge Forman's vote being decisive.

JAMES R. BROWNING.

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Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, Petitioner,

AMERICAN FOREIGN STEAMSHIP CORP., ET ALZ

On Writ of Certiorary to the United States Court of Appeals
for the Second Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT AMERICAN FOREIGN STEAMSHIP CORP.

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Of Counsel:

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IN THE

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UNITED STATES OF AMERICA, Petitioner,

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1. The Government in its Reply Brief (p. 5, fn. 2) calls the Court's attention to the Third Circuit cases of Corabi v. Auto Racing, Inc., 264 F. 2d 784, and Jamison v. Kanmerer, 264 F. 2d 789 pert. denied, 361 U.S. 813, and the Ninth Circuit case of United States v. Price, 263 F. 2d 382, rev'd on other grounds, 361 U.S. 304. These case Confirm that the practice in the various

courts of appeals is to permit a member of a court in banc, who retires from regular active service after a case has been committed to the consideration of the court, to participate thereafter in the court's decision.

The Third Circuit cases were argued in banc on December 1, 1958 (264 F. 2d 784; 264 F. 2d 789). Judge Maris, then an active circuit judge of the Third Circuit, was a member of the court in banc which heard both cases. He retired from regular active service on December 31, 1958 and thereafter participated in the court's decisions in both cases on February 26, 1959.

In the Ninth Circuit case (United States v. Price, 263 F. 2d 382), Judge Healy, who retired on November 30, 1958, participated in the court's in banc decision on January 2, 1959. These cases follow the practice of the court below, of the Fifth Circuit, and the earlier decisions of the Third and Ninth Circuits. (See Brief For The Respondent American-Foreign Steamship Corp., pp. 21-23.)

2. The Government argues (Reply Brief, p. 4) that the Westeyn Pacific Railroad Case, 345 U.S. 247, held that a retired or assigned judge, who had sat on a panel, might take part in the consideration of a petition for rehearing in bane but could not vote on such a petition.

The question of whether a retired or assigned judge who has sat on a panel may participate in a subsequent rehearing in bane of the case is not the question involved here. We pointed out in our main brief (Brief For The Respondent American-Foreign Steamship

^{1 260} F. 2d ix.

^{2 259°}F, 2d xv.

Corp., pp. 31-32) that a court of appeals might assign the entire function of initiating a rehearing in bane to a panel consisting of one circuit and two district judges. This was in refutation of the Government's conclusion that a supposed statutory prohibition against the consideration by retired circuit judges and district judges of petitions for rehearing in bane from panel decisions in which they participated showed a Congressional purpose to exclude such judges from any participation in in bane proceedings. (Govt. Brief, pp. 12, 17, 23)

While we do not wish to engage in extensive combat with the straw man the Government has created, we point out that this Court did decide in the Western Pacific Railroad Case, that:

"A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing in banc to the three judges who are selected to hear the case." (345 U.S. at 259):

that this Court noted that:/

"Two judges on the panel were district judges" (345 U.S. at 263); •

and that it reversed the decision of the court of appeals because those judges apparently acted on the theory that they lacked authority to act on the petition for rehearing in banc. (345 U.S. at 265) Moreover, Mr. Justice Frankfurter, in his concurring opinion, interpreted the Court's decision as holding that a court of appeals might

"allow the discretionary function under § 46(c) to be discharged definitively by the panel whose

judgment may call for en banc action." (345 U.S. at 272; emphasis supplied.)

3. We do not assert, as the Government says we do (Govt. Reply Brief, p. 9), "that Section 46(c), if read literally, would create delays and other undesirable results". Section 46(c) does not provide that in banc cases must be determined by active circuit judges of the circuit (Brief For The Respondent American-Foreign Steamship Corp., p. 18). We urge that there are compelling reasons of policy why such a requirement should not be read into the statute so as to overrule the practice of all courts in cases involving questions which are the same in principle as the question involved in this case. (Brief For The Respondent American-Foreign Steamship Corp., Point I.)

46 The Government says that it regards our statement of facts, which it admits is the same as that set forth in the opinion of the court below, as inaccurate (Reply Brief, p. 11, fn. 10). The statement of facts is based upon the verified amended libel and the affidavits supporting its allegations filed in the district court (R. 1-23). The Government, in support of its motion to dismiss the amended libel for lack of jurisdiction, filed only an unverified exception reading as follows:

"This [District] Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745." (R. 17)

Upon the basis of this allegation the Governments asked the court below to speculate (R. 124) and now

implies that this Court Should speculate as to the existence of a state of facts which, if established, would deprive the district court of jurisdiction under the Suits in Admiralty Act (46 U.S.C. 741 et seq.). Cf. Railway Express Agency, Inc. v. Jones, 106 F. 2d 341, 343 (7th Cir.) If such facts exist the Government should accept the invitation of the court below (R. 124) and allege and attempt to prove them. In the absence of any such allegations and proof, the court below properly assumed the truth of the allegations of the amended libel and its supporting affidavits for the purpose of ascertaining whether the amended libel stated a cause of action within the jurisdiction of the district court. (Postal Telegraph Co.v. City of Newport, 247 U.S. 464, 474.)

Respectfully submitted,

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April, 1960.

As we pointed out in our main brief Breef For The Respondent American-Eoreign Steamship Corp. 12, fulf 9) the Government, in its answer filed one year after the in bane decision of the court below, did not allege the facts which, in its brief on rehearing, it asked the court below to assume were true: